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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT LYNN COCHRAN, *Petitioner,*

v.

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO, and NADER OSTOVAR, *Respondents.*

On Petition for Writ of Certiorari to the Court of Appeals of California

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PETITION FOR WRIT OF CERTIORARI

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137 pp

QUESTIONS PRESENTED

1. May a court impose significant restrictions on the constitutionally protected speech activity of an individual who engaged in such activity hundreds of times over five years, without committing any unlawful or tortious acts, based *solely* on that individual's past association with an organization which engaged in unlawful conduct?

2. May a court use the existence of a "slight double curve" in a street to justify banning an individual's speech activity from the adjacent sidewalk?

3. May a court justify banning an individual's speech activity from a public sidewalk because it allegedly "created a potentially dangerous distraction for passing drivers"?

4. May a trial court base its judgment on grounds it unilaterally raised only in its Memorandum of Decision and Statement of Decision, where the issues were never raised at any earlier stage of the proceedings and the parties had no notice or opportunity to litigate the issues?

5. May a court impose liability for injunctive relief based on constitutionally protected activity?

6. Has a reviewing court fulfilled its duty to make an "independent examination of the entire record" of a case implicating First Amendment rights, when it explicitly refuses to address defendant-appellant's detailed argument that the trial court's findings of facts are not supported by substantial evidence, relying instead on inadmissible evidence to support the judgment of the trial court?

7. Is an injunction valid which purports to impose substantial restrictions on constitutionally protected speech activity on "all persons with actual notice" of the judgment, regardless of whether they are acting in concert with parties?

PARTIES

In addition to the parties listed in the caption, Operation Rescue of California was an appellant in the court below. Petitioner Robert Cochran is not a corporation.

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DECISIONS BELOW

The decision of the First Appellate District of the Court of Appeal of California is reported as *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996) (App. 1a). The decision of the Court of Appeal denying rehearing (App. 58a), the decision of the Supreme Court of California denying review (App. 60a), the decisions and orders of the Superior Court of San Mateo County, California (App. 27a, 31a, 32a, 35a, 38a, 55a), and the orders of the U.S. District Court for the Northern District (App. 17a, 21a) are unreported.

JURISDICTION

The Court of Appeal of California entered its decision on October 28, 1996 and denied rehearing on November 20, 1996. The Supreme Court of California denied review on February 19, 1997. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Planned Parenthood Association of San Mateo County ["PPSM"], Planned Parenthood Alameda/San Francisco, and Nader Ostovar are abortion providers.[1] Petitioner Robert Cochran is an individual who engages in weekly sidewalk counseling outside PPSM's San Mateo abortion facility. His activity began in 1989, in response to the message of a pro-life speaker at his church. Reporter's Transcript of Sept. 28 and 29 ["RT 1"]:111.[2]

During his years outside the clinic, Mr. Cochran has spoken to and given information to several women who have then changed their minds about having an abortion. Mr. Cochran, both personally and through a church ministry formed for this purpose, has kept in contact with many of these women, to check on their well-being and provide support to them. RT 1:130-31.

This lawsuit originated in March of 1992, in federal district court, when respondents brought an action alleging a federal claim under 42 U.S.C. § 1985(3), five state law claims, and one claim

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[1] The claims of Planned Parenthood Alameda/San Francisco and Nader Ostovar arose from protest activities occurring outside Ostovar's residence in early 1992. The only link between Mr. Cochran and this activity is Mr. Cochran's own testimony that on one occasion he participated in a prayer vigil outside Ostovar's residence. There is no evidence that he ever engaged in any unlawful conduct with regard to Ostovar or Planned Parenthood Alameda/San Francisco, but he has not contested that portion of the injunction pertaining to Ostovar.

[2] The Reporter's Transcript containing the testimony of Gabriela Gibson, Dian Harrison, and Robert Cochran, will be cited as "RT 1." The Reporter's Transcript containing, in two volumes, the testimony of Nader Ostovar, Therese Wilson, Anne Colby, and Howard Rosenthal, will be cited as "RT 2." These transcripts are separately paginated.

raising both state and federal right to privacy issues. The factual allegations in the complaint dealt almost exclusively with 1) trespass and blockade activities which occurred on February 15, 1992, at the San Mateo clinic and at respondent Ostovar's residence, and 2) various other activities directed at respondent Ostovar at or near his home, also in February, 1992. Clerk's Transcript ["CT"]:17, 500.

As an apparent afterthought to these allegations, respondents also alleged that "anti-abortion protestors" had engaged in regular Saturday protests at the clinic for several years. The complaint alleged that four or five protesters would

> march up and down in front of the clinic, carrying graphic anti-abortion signs, chanting, and shouting. As patients drive or walk up to the clinic, the protestors approach them and try to force them to accept written flyers.

CT:10. The complaint did not in any way identify these "regular Saturday" protestors, nor allege their relationship to the defendants.

Mr. Cochran was not named in this complaint. Rather, the defendants were Operation Rescue of California ["ORC"] and seventeen individuals allegedly involved in the unlawful blockade activities which took place on February 15, 1992. CT:17, 503-507.

Respondents requested a temporary restraining order and preliminary injunction. Despite the fact that the complained-of activity attributed to the defendants consisted of illegal trespass and blockading, the temporary restraining order issued against the individual defendants not only prohibited these activities, but also prohibited "demonstrating, picketing, distributing literature, or counseling" on PPSM's private property in San Mateo, *or within fifteen feet of such property*."[3] App. 25a. Because PPSM's property is ad-

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[3] None of the individual defendants appeared or was represented at this hearing. At a hearing four days earlier, counsel for ORC had appeared. The order issued against ORC omitted the restriction on speech activity within

jacent to a public sidewalk less than fifteen feet wide, the practical effect of this restriction was to ban demonstration activity on the entire public sidewalk in front of PPSM's facility. This order was later extended by stipulation during the pendency of the federal proceeding. CT:82-88.

Respondents immediately informed Mr. Cochran and all other pro-life speakers at the clinic, none of whom were defendants, that the injunction applied to them and they would be arrested if they remained on the public sidewalk in front of the clinic. RT 1:68-69, 72-74, 116-117; RT 2:161-62. From that time on, with the exception of a handful of accidental incursions, Mr. Cochran remained outside the fifteen-foot zone. RT 1:118. Thus, an injunction supposedly obtained because of the unlawful blockade activity of one group of people became the vehicle for sweeping the sidewalk of lawful pro-life speech activity by any person.[4]

In September, 1992, Respondents finally amended their complaint to add Mr. Cochran as a defendant, though for six months they had been using the injunction to keep Mr. Cochran across or down the street from the clinic. CT:17. In June, 1993, Mr. Cochran filed a motion to dismiss for lack of federal jurisdiction, pursuant to *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). The motion was granted in August, 1993. CT:17-18.

In September, 1993, respondents brought virtually the identical action, minus the federal claims, in state superior court. The complaint, which named Mr. Cochran as a defendant, claimed that he, along with the other defendants, "picketed and blockaded the

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fifteen feet of the clinic property. App. 17a. This order is the "less restrictive" injunction later cited by the state trial and appellate courts.

[4] Though the restraining order, as drafted by respondents, originally applied to "all persons acting in concert or participation with [the defendants] *or* with actual notice" of the order, App. 24a (emphasis added), the court later modified the order by changing "or" to "and", thus clarifying that the order did not purport to bind all persons with notice. App. 21a and note, 24a. However, in spite of this change, respondents did not cease their practice of threatening all pro-life persons on the sidewalk with arrest.

San Mateo clinic" on February 15, 1992. CT:12. Respondents sought an injunction prohibiting the defendants and "all persons with notice" from engaging in unlawful activity such as blocking and trespass, as well as from "approaching" persons who indicated they did not wish to be approached and demonstrating within fifteen feet of the clinic property.[5]

Again, respondents applied for a temporary restraining order and preliminary injunction. Mr. Cochran opposed the applications as unsupported by the evidence and violative of his First Amendment rights, which arguments he continued to make at every stage of the trial and appellate proceedings. Presiding Judge Laurence Stevens issued a temporary restraining order which effectively split the sidewalk lengthwise, prohibiting the defendants from demonstrating only within three feet of clinic property. App. 29a. At the hearing on the preliminary injunction, however, Hon. Walter Harrington reinstated the 15-foot zone, along with all of respondents' other requested relief. App. 31a. Moreover, the order the court signed, drafted by respondents, made the injunction applicable to "all persons with actual notice." App. 33a.

Throughout the ensuing litigation, and particularly at the settlement conference, Mr. Cochran offered to stipulate to all the terms of the preliminary injunction except the fifteen-foot zone. Respondents refused these offers. CT:635-638. Therefore, Mr. Cochran went to trial contesting the imposition of injunctive relief against him in its entirety.

In September of 1994, a two-and-a-half day trial was held, with Judge Harrington presiding. At that trial, Respondents devoted the bulk of their case to presenting evidence about the activities of ORC and others (not Mr. Cochran) vis-à-vis Dr. Ostovar, and about the three or four clinic blockades organized by ORC. The

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[5] With respect to respondent Ostovar, respondents sought an injunction with a variety of "stay away" provisions, including a "stay away" zone of 250 feet around Ostovar's residence.

evidence about Mr. Cochran's activity before he was banned from the sidewalk came down to two brief statements by two witnesses.

PPSM Executive Director Anne Colby testified that she had never seen Mr. Cochran block anyone's access to the clinic, but only that she had seen him "walk with authority" in front of patients to talk to them. RT 2:170. PPSM employee Gabriela Gibson was asked what she observed at the "anti-choice protests" in 1990. She replied:

> I observed the protestors on the sidewalk in front of the clinic attempting to approach patients as they arrived. They held signs and pamphlets which they attempted to get to patients. There was a handful.

RT 1:6. Ms. Gibson went on to approximate the "handful" as numbering three to five. She was then asked to describe the "anti-abortion protests" in 1991. She said that the numbers increased to about five to ten, and that they would stay about three hours. RT 1:7. In describing their activities, Ms. Gibson testified:

> They held signs, large signs, with anti-abortion slogans or pictures of fetuses. They returned [sic] patients as they were approaching if by foot. They would rush up to them. If in a car, they were—would also rush up to the driver. They would yell to the patients attempting to stop patients from entering the clinic, yell things regarding abortion, equating abortion with murder.

RT 1: 8. Ms. Gibson then identified Mr. Cochran as one of the "protestors". *Id.*

These statements of Ms. Gibson and Ms. Colby constituted all of the eyewitness evidence presented by respondents concerning Mr. Cochran's activities before the restraining orders.

On February 15, 1995, Judge Harrington issued a minute order granting respondents' requested relief in its entirety. App. 36a. The minute order did not refer to *any* evidence presented at trial.

Instead, stating that his earlier viewing of the site in conjunction with the issuance of the preliminary injunction "continues to be determinative," Judge Harrington upheld the 15-foot zone solely on the basis that "[t]he vehicular through traffic does not have a clear view around the curve, and this fact, taken with the narrow sidewalk, creates an extreme traffic hazard with respect to any congregation of pedestrians on the Plaintiff's side of Palm Avenue."

The issue of the danger to through traffic posed by demonstrators on the sidewalk had *never*, in any form, been raised by any of the parties or by the court prior to the issuance of the minute order. .

The minute order did not make any findings about any of the petitioners' activities. It did not set forth the basis for upholding any other item of injunctive relief other than the zone around the clinic and around respondent Ostovar's apartment building. It also did not say anything about the activities of respondent PPSM's employees, who formed the only "congregation of pedestrians on Plaintiff's side of Palm Avenue" since the federal restraining orders had issued in March, 1992.

ORC requested a statement of the court's findings of fact and conclusions of law, which the court then directed respondents to prepare. The Statement of Decision submitted by respondents bears little resemblance to the court's minute order, and, in fact, little resemblance to the trial. Over Mr. Cochran's written objections, the statement of decision and a judgment granting respondents all of their requested relief, including the 15-foot zone, were signed by the court and filed on April 24, 1995. App. 38a, 55a.

Mr. Cochran and ORC separately appealed the decision. Mr. Cochran, having earlier stipulated to the injunction insofar as it pertained to respondent Ostovar, appealed the injunction in its entirety as to his activities at the clinic, arguing that no part of it was supported by substantial evidence, that it violated his First Amendment and due process rights, and that it was invalid on its face in that it applied to "all persons with actual notice." ORC

appealed the portions of the injunction limiting speech activity at the clinic and respondent Ostovar's apartment building, as well as the provision making the injunction applicable to "all persons with actual notice".

On October 28, 1996, the Court of Appeal for the First Appellate District affirmed the injunction as to all activities at the clinic, except for the "no-approach" provision. It also reversed and remanded for further proceedings the 250-foot zone around respondent Ostovar's apartment building. In doing so, the court refused to examine Mr. Cochran's argument that the judgment was not supported by substantial evidence, instead examining the record only to find inadmissible evidence to support the judgment. The court justified its refusal to examine Mr. Cochran's arguments that the judgment was not supported by falsely claiming that Mr. Cochran's briefs had failed adequately to point out to the court where in the record the insubstantial evidence was.

Ultimately, the court predicated Mr. Cochran's liability solely on his past associations with ORC, claiming that these associations were "enough to justify treating Cochran as either a member of Operation Rescue, or as sufficiently associated with it that he is bound by the injunction against that entity." App. 15a. Thus, the fact that Mr. Cochran had engaged in constitutionally protected speech activity hundreds of times over five years at the clinic, without committing any unlawful or tortious acts, was irrelevant to the court. He had forfeited his free speech rights by giving money to, receiving mailings from, and being "involved" in other unspecified ways "for a few weeks" with ORC. *Id.* The court never specified why ORC was liable, preferring to couch its holding in nonspecific, conclusory terms about "evidence of actual obstruction" and "ensur[ing] unfettered ingress to and egress from the clinic." App. 9a, 10a.

Mr. Cochran and ORC each filed a petition for rehearing, resulting in the appellate court, on November 20, 1996, making two minor modifications not affecting the judgment. App. 58a. Mr.

Cochran and ORC each filed a petition for review in the California Supreme Court. These petitions were denied on February 19, 1997.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition in order to resolve the question of whether its decision in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), setting forth the test for injunctive restrictions on speech, is actually controlling precedent or simply a figurehead before which California courts must doff their caps prior to doing precisely what they please.

These state courts have decided, this Court's rulings notwithstanding, that the presence of any pro-life picketers or leafletters on the sidewalks adjacent to abortion clinics is undesirable and should be banned.[6] As will be shown below, the lower courts' transgressions in pursuit of this end reach far beyond the First Amendment's guarantee of free speech. In their enthusiasm for "protecting" women from pro-life speech, they are willing to sacrifice freedom of association, due process, jurisdictional limits, common evidentiary rules, and ultimately the integrity of the judicial process.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN v. WOMEN'S HEALTH CENTER*.

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[6] *See e.g.*, *Planned Parenthood Shasta-Diablo v. Williams*, 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88 (1995), *cert. denied* 65 U.S.L.W. 3627 (U.S. March 17, 1997) (No 95-576); *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, *cert. denied*, 116 S.Ct. 514 (1995); *People v. Czekaj*, slip op. (Sup Ct. Santa Barbara Co., App. Dep't, Jan. 6, 1995), *appeal denied*, 2d Crim. No. B090057, slip op. (Cal. App. 2d Dep't Feb. 7, 1995), *cert. denied*, 116 S.Ct. 53 (1995); *see also City of San Jose v. Sup. Ct. (Thompson)*, 32 Cal. App. 4th 330, 38 Cal. Rptr. 205 (1995), *cert. denied* 116 S. Ct. 340 (1995) (upholding ordinance prohibiting picketing within 300 feet of "targeted" residence).

A. *There was no evidence that clinic access or pedestrian or vehicular traffic had been adversely affected by the weekly picketing.*

The appellate court stated that the 15-foot speech-free zone ensures "unfettered ingress to and egress from the clinic" and "the unimpeded flow of pedestrian traffic on the sidewalk, and vehicular traffic on the street in front of the clinic." App. 9a. These observations are completely irrelevant unless accompanied by findings that Mr. Cochran actually interfered with physical access to the clinic and with pedestrian and vehicular traffic, and that less restrictive means of protecting these interests were inadequate. *Madsen*, 114 S.Ct. at 2523-24, 2526-27, 2528. Neither the trial nor the appellate court has the authority simply to decree that Mr. Cochran's First Amendment rights are to be subsumed to its idea of what will ensure a better traffic pattern.

Unfortunately, the appellate court's discussion of the benefits flowing from the zone includes only a cryptic reference, based on the trial court findings, rather than an independent examination of the record, to any pre-injunction conduct actually affecting access and traffic interests: "The court also noted that there was evidence of actual obstruction of the sidewalk and the driveway . . .". App. 10a. This statement contains absolutely no specifics about who was responsible for the obstruction, when it took place, how often it took place, or what this "actual obstruction" consisted of.

This use of the word "obstruction" as a talisman which ensures the propriety of any speech-free zone is *not* consistent with the holding of *Madsen*. In *Madsen*, this Court upheld the imposition of a speech-free zone because of the finding, undisputed by the petitioners in that case, that "protesters continued to impede access to the clinic by congregating on the paved portion of the street leading up to the clinic, and by marching in front of the clinic driveways." 114 S.Ct. at 2521. The trial court found that "the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress

from the clinic despite the issuance of the earlier injunction." 114 S.Ct. at 2528. In other words, the Court upheld the zone because interference with access was a *chronic* problem caused by the large crowd of picketers. This Court did not sanction the imposition of zones based on any *isolated* incident of obstruction which might give a trial court the opportunity to say "Gotcha!"

The appellate court's reasoning implies that any unspecified, unquantified inconvenience, caused by unnamed parties, is sufficient to uphold a restriction on the free speech rights of whoever happens to be before the court. However, any court could find, in *any* case of lawful picketing and leafletting on a public sidewalk, that cars tend to slow down, or that some pedestrian had to break his stride walking down the sidewalk. Under the appellate court's malleable ruling, such anemic "evidence of actual interference" would be sufficient for a trial court to exercise unfettered discretion in deciding that a zone of some size will ensure all sorts of benefits to pedestrian and vehicular traffic and safety.

B. *Some of the interests asserted by the trial and appellate court are so broad as to justify any ban on speech activity on the public sidewalk.*

Even more dangerous than the appellate court's low standard of proof for "obstruction" and interference with access is its allowance of various other interests to support the imposition of a zone.

First, the appellate court stated that the trial court, with its personal view of the scene, was "better situated than this court to appreciate not only how closely the clinic waiting room abutted the sidewalk, but also whether and to what extent an exclusion zone was required *to keep chanting protesters at a distance* from

patients frightened by those same protesters" (emphasis added).[7] App. 10a.

Nowhere in *Madsen* did this Court hold, or even suggest, that a proper purpose of a speech-free zone is to put distance between protesters and the clinic waiting room, much less between protesters and patients. Rather, "the accepted purpose of the 36-foot buffer zone is to protect access to the clinic and facilitate the orderly flow of traffic on Dixie Way." 114 S.Ct. at 2528.[8]

Indeed, this Court in *Madsen rejected* a restriction on speech that was designed to protect patients and staff from being "stalked" or "shadowed" as they approached the clinic. The challenged provision prohibited, within 300 feet of the clinic, physically approaching any person seeking services "unless such person indicates a desire to communicate." 114 S.Ct. at 2529. The Court struck down the provision, holding that it burdened more speech than necessary to prevent intimidation and ensure access to the clinic. *Id.*[9]

Though the geographical mechanics differ, obviously the "require[ment]" of keeping protesters "at a distance" from patients, described by the appellate court here, is exactly what this Court considered and rejected in *Madsen*.

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[7] Obviously, the zone does not distinguish between patients who are frightened and patients who are not frightened, the companions of patients, or anyone else approaching the clinic. It also does not distinguish between chanting and non-chanting protesters; in fact, another provision of the injunction forbids producing noise which can be heard inside the clinic. The effect of the zone is to keep *all* protesters "at a distance" from *all* persons approaching the clinic.

[8] *See also* 114 S.Ct. at 2527: "The 36-foot buffer zone protecting the entrances to the clinic and parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way."

[9] *See also Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997): "*Madsen* sustained an injunction designed to secure physical access to the clinic, but not on the basis of any generalized right 'to be left alone' on a public street of sidewalk."

The appellate court also upheld the injunction on the basis of the trial court's finding that "any congregation of pedestrians in front of the San Mateo clinic creates an extreme traffic hazard." App. 10a, 46a. Thus, the appellate court has sanctioned the completely novel legal theory that a court can unilaterally declare a public right-of-way to be an inappropriate forum for all speech activity.[10]

The trial court's justification for this departure from decades of First Amendment jurisprudence was that "[t]he clinic is surrounded on three sides by other buildings; . . . the clinic is sited so that its 'premises are very narrowly set back (less than six feet) from the street,[11] which has a slight double curve in it at that point." If this quite ordinary sidewalk can be deemed too dangerous for free speech purposes, then the First Amendment is much more limited than this Court has previously ruled.

The appellate court's final theory for upholding the zone is that there was evidence of "activities which were *potentially distracting* to passing drivers." App. 10a (emphasis added). Neither the trial court nor the appellate court attempts to explain what these activities were, nor how moving the picketers across the street would diminish the distracting nature of these activities.

If a court can legitimately impose a speech-free zone, prohibiting the peaceful exercise of fundamental free speech rights in the quintessential public forum, based on the potential, or even the

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[10] Cf. *Frisby v. Schultz,* 487 U.S. 474, 481 (1988): "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."

[11] The trial court misspoke here. As respondents exhibits show, the clinic is set back, at one corner of the building, six feet from the *sidewalk*, not from the street. See Plaintiff's Exhibits 11, 21. Additionally, there is a row of parking places along the curb, providing at least ten extra feet between the curb and the actual traffic lane.

actual,[12] distraction of passing drivers, then there is in fact no standard whatsoever for the imposition of speech-free zones. They are there for the asking.

C. *There was no evidence that a less restrictive alternative had been tried and had failed to protect legitimate governmental interests.*

In *Madsen*, the failure of a prior, less restrictive order to protect access was a significant factor in determining whether the buffer zone burdened no more speech than necessary. 114 S.Ct. at 2527. Neither the trial court nor the appellate court could point to any evidence that Mr. Cochran's weekly picketing activity ever threatened access before the injunctions, much less that any interference with access continued despite the imposition of a narrower restrictions. The only interference with access, actual or threatened, came from the three or four clinic blockades. There is not the slightest grounds for believing that restrictions on peaceful picketing and demonstration on the public sidewalk will provide a deterrent to deliberate blockades where criminal laws and injunctions against blocking and trespass do not.

II. *MADSEN* DID NOT SANCTION THE ABROGATION OF DUE PROCESS RIGHTS.

Paragraph 17 of the trial court's Statement of Decision incorporates the court's minute order, with its conclusion, based on its viewing of the site before issuing the preliminary injunction, that "any congregation of pedestrians" in front of the San Mateo clinic "creates an extreme traffic hazard." CT:1010.

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[12] The very proposition that the distraction of drivers can provide a basis for restricting the exercise of fundamental free speech rights such as picketing runs contrary to First Amendment jurisprudence. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (emphasis added): "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be *opportunity to win their attention.*"

The possibility of such a hazard was never raised by either party or by the trial court, for whom it was the "determinative" factor. Thus, Mr. Cochran was deprived of the irreducible minimum of due process, i.e., notice and an opportunity to be heard:

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' [citations omitted]. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [citation omitted].

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Had Mr. Cochran been notified that this alleged hazard was an issue, he would have had the opportunity to include in the record photographs of the site and testimony from traffic safety experts. Instead, the trial record on the issue consisted solely of the uninformed speculation of a superior court judge as to what might create "an extreme traffic hazard."[13]

The court of appeal rejected Mr. Cochran's argument that the court had unilaterally and unfairly injected this issue into the case, because "*Madsen* and *Planned Parenthood* [*Shasta-Diablo v. Williams, supra*] had already identified the traffic issue as a relevant consideration to the decision the trial court was called upon to make." App. 10a n. 7.

However, the fact that *Madsen* and *Planned Parenthood* identified the state's interest in protecting the free flow of traffic as justifying the injunctions on the record in those cases does not mean the interest will automatically justify similar restrictions in other cases, especially where, as here, it was never raised by the

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[13] After the Memorandum of Decision was filed, ORC supplemented the record with photographs of the site and the declaration of a traffic safety expert stating that pedestrians on the sidewalk in front of the clinic pose no hazard to through traffic. CT:903-915.

parties or the court at any stage of the proceedings before judgment. The traffic issue was relevant in *Madsen* because of evidence presented at trial that the activity of the defendants was causing cars to stop in the driveway to the clinic and to interfere with traffic in the street. 114 S.Ct. at 2521, 2528. There was no such evidence here. Indeed, the trial court's findings from its viewing relate to a completely different sort of traffic issue, namely, a hypothetical traffic hazard created by the visual obstruction allegedly resulting from "any congregation of pedestrians on the sidewalk" at the "*slight* double curve" (emphasis added).

The lower court effectively held that in certain cases, defendants have the affirmative duty to refute the existence of any possible state interest with regard to traffic issues. Indeed, since *Madsen* named several applicable governmental interests, defendants must shadowbox with all possible issues which might be on a judge's mind which could fall under the heading of "ensuring the public safety and order" and "protecting the property rights of [] citizens." 114 S.Ct. at 2526. It is, of course, impossible for defendants to anticipate all such issues in all their forms.

Indeed, yet another traffic safety issue was gratuitously injected into the Statement of Decision, courtesy of respondents, namely, the alleged creation of a "potentially dangerous distraction for passing drivers." CT:1011. There was absolutely no evidence of this at trial, and it was never raised as an issue at any stage of the proceedings before the Statement of Decision. Yet this did not stop the court of appeal from citing the non-existent "evidence of . . . activities which were potentially distracting to passing drivers" as grounds for upholding the injunction. App. 10a.

It is a denial of the most fundamental right of due process to impose liability, and particularly the deprivation of constitutionally protected rights, based on claims of which the defendants were never given notice nor an opportunity to litigate. *See, e.g., Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *In re Ruffalo*, 390 U.S. 544, 550-1 (1968); *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct.

2074, 2083 (1996). The appellate court's holding that the Mr. Cochran is at fault for not anticipating that these issues, which the trial court never even hinted at, would be "determinative" of its judgment clearly conflicts with this Court's holdings and with traditional notions of fair play and substantial justice.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING INDEPENDENT APPELLATE REVIEW OF THE RECORD IN FIRST AMENDMENT LITIGATION.

Where a claim of constitutionally protected conduct is effectively made, a reviewing court has the duty "to search the records" in order to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by *insubstantial findings of fact screening reality*." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982) (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1943)) (emphasis added).

This Court recently unanimously reaffirmed the duty of reviewing courts in approaching cases in which the First Amendment freedoms are at stake:

> Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, *without deference to the trial court* . . . This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to make an independent examination of the whole record, so as to assure ourselves that this judgment

> does not constitute a forbidden intrusion on the field of free expression.

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 115 S.Ct. 2338, 2344 (1995) (emphasis added).

The appellate court here acknowledged its duty to "make an independent examination of the record." App. 2a. Its method of doing so, however, was quite unique.

First, the court stated, "The relevant portions of the record consist of testimony, exhibits, and declarations submitted in connection with the preliminary injunction issued in 1993." *Id.*[14] Thus, the court explicitly asserted that it would rely on evidence that not only was not offered, much less admitted, at trial, but that would clearly have been subject to hearsay objections had it been offered.

In contrast to its painstaking examination of the entire record to find any evidence, admissible or not, to support the judgment,[15] the appellate court explicitly refused to consider Mr. Cochran's argument that the judgment of injunctive relief against him was not supported by substantial evidence. The court based its refusal on the grounds that: 1) the petitioners did not set out all of the relevant evidence in their briefs, and 2) "none of the findings are essential to the judgment." App. 15-16a.

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[14] *But see* App. 38a n.1, which specifies that the basis of the trial court's decision was the testimony given at trial, the court's viewing of the premises and the written arguments of counsel. It says nothing about the evidence submitted in connection with the preliminary injunction, which consisted solely of declarations and exhibits but no oral testimony. App. 32a.

[15] In addition to declarations, the appellate court's examination of the entire record also included quoting testimony of Dr. Rosenthal, PPSM's medical director, despite the fact that this very testimony was objected to and the objection sustained. App. 5a; RT 2:185. The court also attributed to Ms. Colby, a witness, the statement of respondents' counsel that the injunction "seems to be the only thing that helps." *Id.*; RT 2:149. Both these errors were pointed out by Mr. Cochran in his Petition for Rehearing, but the court did not correct them.

The utter falsity of the first point is easily established by reading Mr. Cochran's Opening Brief in the appeal, attached as Appendix L. App. 61a. On those issues where there was evidence, however insubstantial, he cited it. However, some findings of fact were simply created out of thin air by the respondents, and thus there was no evidence in the record, substantial or otherwise, to cite. Moreover, in addition to the citations in Mr. Cochran's Opening Brief, respondents' Brief in Opposition also provided citations to the record which respondents claimed supported the court's findings, and Mr. Cochran's reply brief addressed these citations. Thus, the appellate court's implication that, because of Mr. Cochran's allegedly inadequate briefing, it would be forced to "comb the record" to find the disputed testimony, is blatantly false. *See* App. 68-79a.

As to the court's second point, only by reading Mr. Cochran's Opening Brief can this Court learn what findings the court deemed not essential to the judgment. Mr. Cochran disputed, *inter alia*: (1) that he had participated in the rescues at the clinic, (2) that ORC sponsored or that its members participated in the regular Saturday morning protests, (3) that Mr. Cochran ever entered onto or obstructed access to PPSM's property, (4) that Mr. Cochran "repeatedly hounded patients, running toward them, following them down the sidewalk as they approach the clinic entrance, haranguing them loudly, and thrusting literature at them even after they have indicated they do not want it," App. 41-42a,[16] (5) that the noise made by the regular protesters could be heard inside the clinic, (6) that Mr. Cochran chose to engage in his speech activities on Saturdays because he knew that "the targeted patients would be particularly vulnerable to their campaign of harassment and intimidation," App. 43a,[17] (7) that there was any evidence that

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[16] Cf. testimony of Gabriela Gibson and Anne Colby at p. 6, *supra*

[17] Cf. testimony of Robert Cochran:

"I understand that if a woman is going in for an abortion, she's likely to be very upset and I try to approach her in a way that she will talk to me; that she will receive the information and perhaps, she would receive some

he, or the "weekly protests" in general, had interfered with the free flow of traffic on the sidewalk, obstructed the passage of vehicles into the driveway, or created a potentially dangerous distraction for passing drivers. App. 75-79a..

The court of appeal held that none of these findings is essential to the judgment. Rather, the sole basis for the judgment against Mr. Cochran was nothing more than some vague "involvement" with ORC. App. 15a. And, despite the court's discussion of the regular weekly protests, traffic issues, and obstruction of the sidewalk, its dismissal of these as disputed factual issues not essential to the judgment means the basis for the injunction against ORC can only be that it instigated three or four blockades at the clinic over the course of five years. By default, this sporadic unlawful activity by ORC provides the only factual basis for enjoining Mr. Cochran from engaging in the peaceful, constitutionally protected conduct he engaged in for three years before the first restraining order issued.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *NAACP V. CLAIBORNE HARDWARE CO.*

Unfortunately, rather than making clear that the basis for the issuance of the injunction was ORC's unlawful blockades, the appellate court's decision weaves together lawful and unlawful activity, as if both provided equal grounds for injunctive relief. In fact, though the court distinguished the rescues from the regular picketing in a footnote, App. 6a n.4, in its general description of "the protests" at the clinic it is virtually impossible to tell whether certain statements refer to the unlawful rescues or to the lawful weekly protests. App. 4-6a.[18]

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hope and alternatives to having a child aborted and that she would change her mind about an abortion that day or in the future." RT 1:109.

[18] As this Court has written: "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be

In setting out the background of the litigation, the court makes only two statements which apparently purport to describe what the weekly protesters *did*, as opposed to the alleged effect of their conduct on patients. The court states, "Protesters would try to prevent driving into the clinic parking lot. Often directly in front of the clinic they were 'chanting, singing, praying, talking, and holding signs with pictures of fetuses on them, birth signs, abortion is murder.'" App. 5a.

These sentences refer to the testimony of PPSM medical director Howard Rosenthal, whose exact statement about protesters in the driveway was, "I see them before the injunction standings [sic] around the driveway trying to block to get [sic] to people driving in. Tapping on my window as I went by." RT 2:183-4. This is hardly unambiguous testimony that protesters were preventing cars from entering the driveway.[19]

What is more striking, however, is the court's quotation of Dr. Rosenthal's testimony about the activities of the protesters on the sidewalk. "Praying, talking, and holding signs" on a public sidewalk are all quintessential First Amendment activities, as are chanting and singing, provided they are not done at such a volume as to cause a disturbance. *Edwards v. South Carolina*, 372 U.S. 229

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supported by findings that *adequately disclose* the evidentiary basis for concluding that specific parties agreed to use *unlawful* means, that *carefully identify* the impact of such *unlawful* conduct, and that recognize the importance of avoiding the imposition of punishment for *constitutionally protected activity*." *NAACP v. Claiborne Hardware, Co.* 458 U.S. 886, 933-34 (1982) (emphasis added).

A fortiori, the lower court here had the duty, in setting out the facts, to make some effort to distinguish between the prolonged peaceful, lawful, and constitutionally protected activities of Mr. Cochran and others, and the handful of occasions on which Operation Rescue appeared on the scene and violated the law. Instead, the court was studiously ambiguous in its recitation of the facts.

[19] Moreover, Dr. Rosenthal did not identify Mr. Cochran as one of the protesters he had seen engaging in this activity.

(1963).[20] Yet the court of appeal strongly suggests its disapproval of this conduct, as if these activities lost their constitutionally protected status because of their alleged effect on the emotional well-being of patients.

The First Amendment does not tolerate restrictions on speech predicated on subjective audience reactions. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for affording it constitutional protection." *Simon and Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

The appellate court's treatment of classic constitutionally protected speech activity as if it were tortious conduct is clearly contrary to many of this Court's decisions, including *Claiborne Hardware*, *supra*, and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

V. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING DUE PROCESS AND FREEDOM OF ASSOCIATION.

As noted above, the sole basis for the appellate court's decision to uphold the judgment as to Mr. Cochran was his unspecified "involvement" with ORC for a few weeks, as well as other minor contacts with absolutely no connection to either his or ORC's activities at the San Mateo clinic.[21] App. 15a. Because of these con-

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[20] Gabriela Gibson, an employee of PPSM whose job it was to monitor the activities of the regular protesters, RT 1:4, testified that she did not recall hearing the protesters inside the clinic. RT 1:10. Therefore, the appellate court, in its thorough "examination of the whole record" relied instead on the testimony of Ms. Colby that she had heard the protesters in the waiting room, despite the fact that Ms. Colby also testified several times that she was not usually at the clinic on Saturdays, other than on the three or four days there were rescue blockades. RT 2:135, 145-6, 171, 172.

[21] As Mr. Cochran pointed out in his Petition for Rehearing, it is amply clear from the testimony at trial that Mr. Cochran did *not* "attend[] rallies and rescues . . . at this clinic." App. 15a. He was at the clinic every Saturday, and on three Saturdays over the course of four or five years, ORC appeared and staged blockades. Mr. Cochran knew nothing about these events before

tacts, the court concluded, Mr. Cochran can be treated as either a member of ORC or sufficiently associated so as to be bound by the injunction issued against ORC. *Id.* The court cited in support various authorities sanctioning the application of injunctions to persons "in active concert or participation" with named parties.

The purpose of injunctive provisions binding those "in active concert or participation" is to ensure that "defendants may not nullify a decree by carrying out prohibited acts through aidors and abettors, although they were not parties to the original proceedings." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *See also*, *G. & C. Merriam Co. v. Webster Dictionary Co., Inc.* 639 F.2d 29, 35 (1st Cir. 1980) (emphasis added): "[A] non-party, if not legally identified with a party, can be found in contempt only if in active concert or participation with a party in *postinjunctive* activity."

Here, however, the lower used Mr. Cochran's *past* associations with ORC, unrelated to the alleged wrongful conduct in the case, to hold that Mr. Cochran is bound in the future by the injunction against ORC. This holding was made despite the uncontradicted evidence presented at trial that Mr. Cochran's activities at the clinic were completely independent of any connection with ORC. RT 1:108-9, 113.

Thus, the lower court changed the concept of "in *active* concert or participation" with a named party in enjoined activity into "*inactive* concert or participation," i.e., "are you now, or have you ever been, associated with" an unpopular organization. The wrong answer from an individual results in the loss of his or her constitutional freedoms.

It is well-established that "[m]ere association with [a] group—absent a specific intent to further an unlawful aim embraced by

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they took place, and in no way participated in them. RT 1:115-6. This evidence was undisputed. The appellate court's assertion, in the face of this undisputed evidence, that Mr. Cochran "attended" rallies and rescues at this clinic illustrates its shockingly cavalier attitude toward the evidence.

that group—is an insufficient predicate for liability." " *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 925-6 (1982). Moreover, "civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 925 n.69. This Court "has consistently disapproved governmental actions imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James* 408 U.S. 169, 185-6 (1972).

The appellate court's holding is an affront to long-standing Supreme Court precedent on the fundamental rights of freedom of association and due process.

VI. AN INJUNCTION WHICH PURPORTS TO BIND "ALL PERSONS WITH ACTUAL NOTICE" IS INVALID ON ITS FACE.

The permanent injunction states that it is binding on "all persons with actual notice" of the injunction. App. 56a. In practice, of course, this means the order has bound and will bind all persons expressing a pro-life message in the vicinity of PPSM's clinic. This provision is outside the trial court's jurisdiction, and violates the due process rights of individuals not party to this lawsuit:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Martin v. Wilks, 490 U.S. 755, 761-2 (1989). *See also Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934) (order purporting to bind "all persons to whom notice of the order of injunction shall come" was clearly erroneous as it "assumed

to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to law").

The appellate court dismissed Mr. Cochran's challenge to the ordinance as facially overbroad and invalid, on the grounds that Mr. Cochran, as a party, lacked "standing to challenge a portion of the [injunction] applying to persons who are not parties" (quoting *Madsen*, 114 S.Ct. at 2530). The court's argument ignores the distinction between *Madsen* and the instant case, namely, that in *Madsen*, the injunction applied only to persons "acting in concert" with the petitioners, and thus could only be overbroad in its actual *application* to specific non-parties under a particular set of facts. By contrast, the injunction in the instant case applies *on its face* to all persons with mere notice, and thus is facially unconstitutional:

> [A court] cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (per L. Hand, J.).

Clearly, such a facially overbroad restriction, especially one that serves as a shield for a viewpoint-based restriction on speech, may be challenged, even by one whose who conduct would legitimately be covered by a narrower restriction. *Broadrick v. Oklahoma* 413 U.S. 601 (1973).

CONCLUSION

In the instant case, the trial court admitted some months after trial that it had made up its mind about the outcome of the case when the matter first came before it on a hearing for preliminary injunction in 1993, though it neglected to inform the parties of this. App. 36a. Pursuant to the court's order, the respondents then produced findings of fact which, in complete disregard of the evidence actually presented at trial, set out to dot the i's and cross the t's for an injunction sustainable under *Madsen*. App. 38a.

Rather than taking a critical look at the results of this questionable procedure, the appellate court explicitly refused to examine the findings challenged by the petitioners. Instead, it used those findings to complete a *Madsen* checklist (i.e., obstruction, court's options limited by clinic configuration, traffic problems, failure of narrower order), displaying no interest whatsoever in looking beneath the surface of the court's findings.

If the appellate court's excessively deferential attitude toward the trial court's findings is correct, then, rather than the exception, speech-free zones will be the rule in any picketing case, or rather, in any case where the trial court happens to want such a zone. In such cases, the court can easily find, confident that its judgment will not be reviewed in any true sense, that keeping picketers away from the target of their demonstration has some beneficial effects on traffic, access, or "public health and safety."

Petitioner Robert Cochran respectfully asks this Court to grant this Petition.

Respectfully submitted,

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May 9, 1997

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

No. A070725

(San Mateo County Super.Ct.No. 384995)

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY et al.,
Plaintiffs and Respondents,

v.

OPERATION RESCUE OF CALIFORNIA et al.,
Defendants and Appellants.

[Filed Oct. 28, 1996.]

Defendants Operation Rescue of California and Robert Lynn Cochran appeal from a permanent injunction establishing place and manner restrictions on demonstrations conducted at: (1) a clinic operated by plaintiff Planned Parenthood Association of San Mateo, and (2) the home of plaintiff Dr. O., a physician who treats patients at the clinic. The primary issue presented is whether the restrictions go beyond the guidelines of *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. ___ [114 S.Ct. 2516] (*Madsen*) to impinge upon protected speech.

We conclude: (1) that the ban on protesters coming within 15 feet of the clinic serves significant state interests and is compatible with constitutional requirements; (2) the exclusion of protesters within 250 feet of the apartment building in which the doctor resides cannot be sustained because a less restrictive measure holds reasonable the prospect of striking a more precise balance between the competing goals of preserving personal privacy while maximiz-

ing the opportunity for public expression; and, (3) that the portion of the injunction which forbids appellants from "[a]pproaching any Planned Parenthood staff member, patient, or companion once that person has made it unmistakably clear that he or she does not wish to be approached" burdens speech more than necessary. We therefore affirm the judgment in part and reverse in part.

BACKGROUND

Because constitutional freedoms are involved, this court must make an independent examination of the entire record. (See *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1654.) The relevant portions of the record consist of testimony, exhibits, and declarations submitted in connection with the preliminary injunction issued in 1993.

Dr. O. described the tactics used against him. On February 15, 1992, he left his apartment and was about to drive away when a group of 20 to 25 people surrounded his car. Several persons placed themselves on the ground in front of and behind the car. Others banged on it. When Dr. O. tried to return to his apartment "they blocked the . . . entrances and started talking to me about . . . abortion. . . . [¶] They had pictures and the usual talks and they made me promise that I will not do abortions, otherwise we will not let you go inside your house. We will not let you go out." Dr. O. made it to his apartment and called police. When an officer arrived, the group had dispersed. The officer escorted Dr. O. to the clinic. That night Dr. O. found on his wife's car a note "which said that you promised not to kill and . . . Jesus will punish you, things like that." All of the tires on his car had been deflated.

About a week later, Dr. O. noticed he was being followed by a brown pickup as he drove to work. After he stopped at a doughnut shop, Dr. O. was approached by a man who had been in the group of the previous week. The man called Dr. O. by name and said "I want to talk to you." Dr. O. left and resumed driving. The man continued to follow in his own vehicle. Dr. O. stopped at a gas

station and was talking to police when the man again "stood next to me." The man left when Dr. O. began describing him to police over the telephone.

Four days later the same man in a brown pickup was waiting outside Dr. O.'s apartment complex when he left early in the morning to drive to the "Chico clinic." "[H]e followed me for a couple of streets and then he went away."

Three days later, February 29, 1992, a group outside his apartment waved antiabortion banners and chanted. They also handed out pamphlets and showed "antiabortion movies" on a video machine to people walking by on the sidewalk. The group numbered approximately 15 and "they were protesting outside for quite a while." Eventually Dr. O. "received a call from the police car who [*sic*] was there outside the apartment." The officer apparently informed Dr. O. that the protesters were willing to leave "if I go down and talk to them." With the officer as escort, Dr. O. met with the group. During the ensuing discussion, one of the group admitted that "we" had deflated the tires on Dr. O.'s car.

On March 7, 1992, a smaller group was again outside the apartment. One person had a camera and was taking pictures. With the aid of a "police escort," Dr. O. drove to work.

Several days later, Dr. O. and his wife were in Chico. His wife passed on a note which stated " 'Stop doing abortions, your hands are bloody,' and things of that effect." Dr. O. was followed by "abortion protesters" as he went into the clinic.

On March 14, 1992, three people outside Dr. O.'s apartment were carrying "a very large sign [] stating that Dr. Dahmer lives here." "Then police came and . . . they went away."

A week later a group of 20 to 25 persons were outside Dr. O.'s apartment "walking back and forth on the . . . sidewalk, and chanting very loudly." Police arrived and "video taped the whole incident."

Therese Wilson is responsible for security at the clinic. Following the February 15th incident, the clinic arranged for "teams" of four staffers to "go to Dr. O[.]'s house every Saturday and be there with his family just in case protesters did arrive." On March 7th Wilson saw Steve Butler "taking pictures of the house and of us" and "also of our license plates on our cars."[1] Wilson knew from a protest at the Pleasanton clinic that Butler had publicly identified himself as affiliated with Operation Rescue. Butler was also connected with Youth For America. Wilson was present at the March 21st protest outside Dr. O.'s apartment. The protesters carried "the same signs . . . we see at demonstrations that Operation Rescue coordinates." The protest, which lasted for approximately five hours, broke up when police threatened to make arrests for violating a federal court's restraining order. Literature and newsletters from Operation Rescue and Youth For America indicated that protests would be held outside Dr. O.'s home on specified dates; press releases took credit after the protests had been held.

Ms. Wilson further testified that "this was the first time one of our doctors had been singled out" and "harassed in a pattern" "at home as well as . . . work." Abortion opponents are now "targeting . . . on doctors when they used to focus in on patients [entering] our clinics."

Anne Colby testified that there were regular protests from 1988 to 1992 while she was executive director of the clinic.[2] During this period several "very large . . . blockades" of more than 100 protesters resulted in the clinic's temporary closure. Typically, "rows of people block[ed] all the doors" to the clinic. On at least one occasion police arrested protesters inside the clinic. These

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[1] Dr. O. identified Butler as the person who admitted the deflating of the tires of his (Dr. O.'s) car. Dr. O. testified that Butler was present at the protests on February 15, February 29, and March 7.

Butler stipulated to entry of a permanent injunction against him.

[2] In a 1992 declaration Ms. Colby stated that police had been summoned "on dozens of occasions" to deal with protests at the clinic.

demonstrations were organized or coordinated by Operation Rescue. Patients found the protests threatening, and some did not come into the clinic for appointments. Noise from the protests could be heard in the patient waiting room, which abuts the sidewalk. The protests caused the clinic to shift its entrance doors and to hire and train staff for an "escort program" to bring patients through the protesters. According to Ms. Colby, injunctive relief "seems to be the only thing that helps."

The trial court found that: "Defendants' conduct has effectively forced [] patients to walk a gauntlet of intimidation to reach the clinic. It has frightened them, reduced them to tears, and caused them severe emotional upset. Patients' heightened stress levels, in turn, have complicated their medical procedures. Patients have required more counseling and, on occasion, more medication before procedures are performed. Others have canceled or delayed their appointments to avoid the protesters. The evidence showed that delaying an abortion procedure increases the likelihood of complications and may force the woman to undergo the more complicated procedure used in second trimester abortions rather than the simpler first trimester procedure."

Dr. Howard Rosenthal is the medical director for Planned Parenthood in San Mateo. He testified that "before the injunction" the protests "upset patients and caused them to be angry, upset, hostile, crying, frightened and made our job a lot more difficult." Protesters would try to prevent driving into the clinic parking lot. Often directly in front of the clinic they were "chanting, singing, praying, talking to people and holding signs with pictures of fetuses on them, birth signs, abortion is murder." The noise generated by the protesters could be heard inside the clinic. Some patients "didn't show up. . . . [I]t was just too much to handle." Those that came into the clinic required "a lot more calming down and . . . made the procedures more difficult." The protests have also "taken their toll on the staff." Some protesters "were seen in the recovery room window," which "really upset several patients." Dr. Rosenthal agreed with Ms. Colby that the injunction, by shift-

ing the protesters across the street from the clinic, had eased matters for patients and staff.

The initial injunction was issued by the federal district court in March of 1992. Its essential features were the same as subsequently imposed in the injunction now being appealed: buffer zones of 250 feet for Dr. O.'s residence and 15 feet for the clinic.[3] The federal injunction was in effect when, on July 17, 1993, the clinic was the scene of another "rescue."[4] By this time the entrance doors to the clinic had been shifted from the sidewalk at the front to the side adjacent to an interior driveway. Approximately 150 protesters blocked the clinic's entrances and its driveway. Patients had to be escorted from the clinic by police. Photographs taken at the time depict: (1) a line of protesters on the sidewalk in front of the clinic, clearly closer than 15 feet from the building; (2) a double row of protesters blocking the relocated entrance on the side of the clinic; the front row of protesters is seated on the ground, the back row is standing with arms interlocked and behind large sections of plywood; (3) a large group of protesters across the street, facing the clinic with banners and placards; and (4) a number of protesters are wearing clothes on which "Operation Rescue" is clearly visible. Dian Harrison, Ms. Colby's successor as the clinic's executive director, testified that the demonstration was preceded by a number of telephone calls from a person who identified himself as "Jim from Operation Rescue." The first advised that "we had been targeted for blockade that morning"; following calls reported that protesters were on the way and gave the routes they were taking as they got closer to the clinic.

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[3] The federal injunction expired shortly after the district court determined that it lacked subject matter jurisdiction but not until Planned Parenthood and Dr. O. had commenced this state court action in September of 1993.

[4] A "rescue" is much larger in scale than the small (and apparently peaceful) group which picketed the clinic on a regular basis. A "rescue" is a planned, systematic attempt to stop the clinic from functioning. The trial court found that there were four "rescues" at the clinic—in July of 1988, July of 1990, February 15, 1992, and July 17, 1993.

In September of 1993 Planned Parenthood commenced this action and obtained a temporary restraining order preventing protesters from coming closer than 250 feet from Dr. O.'s residence and 3 feet from the clinic. Two months later, when the preliminary injunction was issued, the buffer zone around the clinic was increased to 15 feet.

A permanent injunction was entered after the trial court conducted an evidentiary hearing. In addition to what has already been recounted, the court received evidence that a number of protesters, including appellant Cochran, repeatedly violated the provisions of the injunction. Cochran admitted the violations but insisted they were inadvertent.

The "Judgment Of Permanent Injunction" dealt separately with Dr. O. and the clinic. Defendants were ordered not to threaten, follow, telephone, photograph, or block his movements. They were further directed to "stay at least 30 feet away from Dr. O. and his family members," and "at least 250 feet away from Dr. O.'s residence." As to the clinic, defendants were enjoined from: (1) obstructing passage of persons or vehicles into the clinic; (2) "Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached"; (3) "Shouting, screaming, or otherwise producing loud noises which can be heard within [the] Clinic"; (4) "Physically touching, threatening to physically touch, or shouting at any individual entering or leaving [the] Clinic"; and, (5) "Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property . . . (including the walkway at the front of the clinic building, the walkways and driveways on either side of the clinic building, and the parking area behind the clinic building), or within fifteen (15) feet of such private property."

REVIEW

I

Both Operation Rescue and Cochran attack the "buffer zone" provision which the trial court established for the clinic. Operation Rescue also objects to the "buffer zone" for Dr. O.

(A)

The applicable governing principles are settled.

As a general matter, the protesters enjoy full constitutional protection for the expression and communication of their views concerning the public issue of abortion. (E.g., *Boos v. Barry* (1988) 485 U.S. 312, 318.) This is particularly true when these protected activities occur on the public streets and sidewalks, traditionally viewed as the quintessential public forum. (E.g., *Frisby v. Schultz* (1988) 487 U.S. 474, 480-481.) An injunction curtailing protected expression will be upheld only if the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. (*Madsen*, *supra*, 512 U.S. at p. — [114 S.Ct. at p. 2525].)

Madsen, and our state Supreme Court's subsequent decision in *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009 (*Planned Parenthood*), precisely establish the state interests at issue in this situation. The state has strong concerns in: (1) protecting the freedom of women to seek lawful services in connection with pregnancy, (2) the delivery of those services with appropriate privacy, (3) preserving public safety and order by ensuring the free flow of vehicular and pedestrian traffic, and (4) preserving property rights. (*Madsen*, *supra*, 512 U.S. at p. — [114 S.Ct. at p. 2526]; *Planned Parenthood*, *supra*, at pp. 1017, 1020-1023.) "[T]he combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." (*Madsen*, *supra*, at p. — [114 S.Ct. at p. 2526].) And if a home is involved the state interest in preserving residential

privacy is exceptionally potent. (Id. at pp. __ - __, [114 S.Ct. at pp. 2529-2530].)

We now analyze whether the injunction protecting those interests burdens "no more speech than necessary." (*Madsen*, *supra*, 512 U.S. at p. __ [114 S.Ct. at p. 2525].)

(B)

The *Madsen* court upheld a 36-foot buffer zone around a clinic. The *Planned Parenthood* court affirmed an injunction which limited protest activities to the sidewalk across the street from a clinic. The 15-foot exclusion zone imposed here falls somewhere between *Madsen* and *Planned Parenthood.*[5]

The portion of the injunction ordering protesters to stay off the clinic's property is unexceptional–there is no federal constitutional right to trespass. (E.g., *Adderley v. Florida* (1966) 385 U.S. 39, 47-48; *Cox v. Louisiana* (1965) 379 U.S. 536, 554-555.)[6] The injunction also ordered protesters not to demonstrate, picket, distribute literature or counsel within 15 feet of the clinic's "private property." In practical effect this required the protesters to stay off the sidewalk at the front of the clinic, and to move either to the sides or across the street. According to the record, the protesters thereafter moved across the street.

The buffer zone encompasses the entrances to the clinic and the interior parking lot, thus ensuring unfettered ingress to and egress from the clinic. It also ensures the unimpeded flow of pedestrian traffic on the sidewalk, and vehicular traffic on the street in front of the clinic. The deference normally extended to a trial court's findings on these sort of fact-specific issues is enhanced by the fact that the trial court here made a personal view of the scene.

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[5] The United States Supreme Court recently agreed to review a circuit court decision upholding 15-foot "bubble zone" around a clinic. (*Pro-Choice Network of Western New York v. Schenck* (2d Cir. 1995) 67 F.3d 377, cert. granted __ U.S. __ (1996) [116 S.Ct. 1260].)

[6] Appellants here invoke only the United States Constitution.

(Cf. *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 708.) The trial court would therefore be better situated than this court to appreciate not only how closely the clinic waiting room abutted the sidewalk but also whether and to what extent an exclusion zone was required to keep chanting protesters at a distance from patients frightened by those same protesters.[7]

The configuration of the clinic and the surrounding geography limited the trial court's options. The clinic is surrounded on three sides by other buildings; only the side facing the sidewalk and street could be used by the protesters. As the trial court describes it, the clinic is sited so that its "premises are very narrowly set back (less than six feet) from the street, which has a slight double curve in it at that point." The present waiting room for the clinic fronts on the sidewalk. Two driveways cross the sidewalk giving access to a rear parking lot. Given the physical layout of the building and the site the trial court specifically found that "any congregation of pedestrians in front of the San Mateo Clinic creates an extreme traffic hazard." The court also noted that there was evidence of actual obstruction of the sidewalk and the driveway, as well as activities which were potentially distracting to passing drivers.

Moreover, as the trial court found, neither the 15-foot exclusion zone nor a less restrictive area imposed by a prior federal court injunction had been consistently effective in permitting unfettered access. Based upon an analogous situation in *Madsen* of a less restrictive but ineffective prior injunction, the Supreme Court concluded that it was permissible to include the entire sidewalk frontage along the clinic property within a buffer zone, especially where protesters standing across a narrow street could still be seen

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[7] We reject appellant Cochran's claim that the trial court, with what it learned from its view of the scene, unilaterally injected the issue of traffic disruption into the case. At the time the view was made, *Madsen* and *Planned Parenthood* had already identified the traffic issue as a relevant consideration to the decision the trial court was called upon to make. (*Madsen*, *supra*, 512 U.S. at pp. ___ - ___ [114 S.Ct. at pp. 2526-2527]; *Planned Parenthood*, *supra*, 10 Cal.4th at pp. 1017, 1020, 1022-1023.)

and heard by individuals coming to the clinic. (Accord, *Planned Parenthood*, *supra*, 10 Cal.4th at p. 1024 ["A less restrictive alternative had been tried and found wanting."] Here, too, the trial court found that protesters standing across the narrow street on the sidewalk "can easily be seen and heard." In this case where access had been impeded even with a 15-foot buffer zone in place we cannot say that the inclusion of all the sidewalk fronting the clinic property within the 15-foot exclusion zone burdened more speech than was necessary to prevent intimidation and permit access.

(C)

Dr. O. lives in an apartment complex whose dimensions are approximately 60 yards by 45 yards. Dr. O. likened the complex's configuration to a horseshoe, with the open end abutting the sidewalk along a public street. His apartment is on the second floor, at the front of the complex. He looks down on the sidewalk. The photographs produced at trial show the apartment building as being set back about 10 yards from the sidewalk in a neighborhood which appears to be exclusively residential.

The injunction ordered protesters to "stay at least 250 feet away from Dr. O[.]'s residence." This directive has an inherent element of imprecision because the site of Dr. O.'s apartment is not established within the complex. It cannot be determined whether the 250 feet commences from the particular part of the complex in which Dr. O. and his wife live, or from the entire complex, or, like the clinic, from the property line. Regardless of how the buffer zone is measured, the practical effect is that the sidewalk in front of the apartment complex is completely closed to protesters. As they have at the clinic, the protesters moved across the street from the complex. However, the photographs of the scene show the protesters within 250 feet of Dr. O.'s residence, regardless of the point from which that distance is measured. In fact, a point 250 feet from the front of Dr. O.'s building would put the protesters in the center of the building on the opposite block. Thus literal enforcement of the injunction would require the protesters to move

250 feet down the street from either side of the complex in which Dr. O. resides.

Madsen struck down a 300-foot zone around a private residence on the ground that "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." (*Madsen*, *supra*, 512 U.S. at pp. __ - __ [114 S.Ct. 2516, 2529-2530].) The trial court attempted to distinguish *Madsen* and *Murray v. Lawson* (1994) 649 A.2d 1253 (300-foot residential buffer zone reduced to 100 feet) on the ground that the setting here was not a single-family residence, but a complex in which numerous persons, not the protesters' target also lived. *Madsen* requires a more laser-like approach.

The 250-foot zone denies the protesters any opportunity to demonstrate in front of Dr. O.'s building. Instead, they are funneled down the sidewalk to a position which not only effectively eliminates the possibility of the delivery of their message to its intended target but shifts the entire burden of adverse consequences to Dr. O.'s neighbors. Unlike the situation at the clinic, a less restrictive approach has never been tried. It must be.

We will not undertake that task in the first instance. It is far more appropriate that the initial effort be entrusted to the discretion of the trial court, which has a far sounder basis for determining what is appropriate to the circumstances. In making that determination the trial court may consider a number of options. It could, for example, as *Madsen* suggested, decide that no more 10 protesters, keeping a certain distance between themselves, be allowed to picket between specified hours on specified days. (See *Murray v. Lawson*, *supra*, 649 A.2d 1253, 1268; *Hirsh v. City of Atlanta* (Ga. 1991) 401 S.E.2d 530, 531, fn. 1.) The court could allow picketing on the sidewalk in front of Dr. O.'s building and reserve the option of moving them across the street if difficulties arise. Or, as was done in *Planned Parenthood*, the picketers could be confined to a specified area. (See *Bering v. Share* (Wash. 1986) 721 P.2d 918, 923.) The court could require advance notice. (*Murray v. Law-*

son, *supra*.) Other alternatives or factors may be suggested by the parties for the trial court's consideration.[8]

II

Madsen struck down as unduly burdensome an injunctive prohibition against "physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." (*Madsen*, *supra*, 512 U.S. at p. ___ [114 S.Ct. 2516, 2529].) Citing the principle quoted in *Madsen*—"As a general matter . . . in public debate . . . citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment"—Cochran argues that the injunction could not constitutionally require him to discontinue communicating with a person "once that person has made it unmistakably clear that he or she does not wish to be approached." The language at issue here enjoins appellants from "Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached."

In striking down the no approach provision in *Madsen* the Supreme Court objected first to its "prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be" as "burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." (*Madsen*, *supra*, 512 U.S. at p. ___ [114 S.Ct. at p. 2529].) Finding that there was no evidence that the speech was either

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[8] Our decision to reverse, announced here, is advance notice of the impending demise of a part of the injunction protecting Dr. O., his wife, and their neighbors. Pending delivery of our remittitur, respondents may deem it prudent to approach the trial court for modification of the defective provision of the permanent injunction, thus ensuring that Dr. O. and his wife are not inadvertently left unprotected. The trial court will have jurisdiction to modify an injunction even while an appeal is pending. (E.g., *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 787-789.)

"independently proscribable (*i.e.*, 'fighting words' or threats), or [was] so infused with violence as to be indistinguishable from a threat of physical harm" the court concluded that the provision was constitutionally infirm. The court also based its ruling on a second and independent holding that a listener's willingness to hear may not define when a speaker may talk. Thus, the court found that "[t]he 'consent' requirement alone invalidates this provision" because it also burdens more speech than necessary to achieve the twin goals of no intimidation and clinic access. (*Ibid.*)

The no-approach provision in this injunction suffers from the same infirmities as that in *Madsen*. Like *Madsen*, the speaker's opportunity for conversation or leafleting is defined by the consent of the potential listener or reader. It is a distinction without a difference that under this provision the listener may be subjected to some speech before making it "unmistakably clear that he or she does not wish to be approached." Once the listener manifests lack of consent the speaker may no longer approach and as a practical matter may not proffer leaflets or conversation. Here, like *Madsen*, there was no finding by the trial court that the speech was independently proscribable or violent. Because the provision limits speech to that consented to by the listener it burdens speech which is peaceable but unwelcome to the listener.

Moreover the no-approach provision here applies far more broadly than that in *Madsen* because it is not limited to approaches made in proximity to the clinic, and thus by its terms limits speech directed to certain persons regardless of where they may be. While the trial court made the factual finding that "individuals *approaching the San Mateo Clinic* have been hounded, intimidated, and harassed" (italics added), the injunction speaks to any approach without specifying that it be made in the vicinity of the clinic. In this respect as well we find the provision burdens more speech than is necessary to ensure physical access to the clinic.

III

Appellants' remaining contentions may be resolved quickly.

Cochran appears to argue that the injunction is an impermissible attempt to restrict speech based on its content. The Supreme Courts of the United States and California have expressly held to the contrary. (*Madsen*, *supra*, 512 U.S. at pp. — - — [114 S.Ct. 2516, 2523-2524; *Planned Parenthood*, *supra*, 10 Cal.4th at pp. 1019-1020.)

The injunction applies to "Defendants . . . and all persons acting in concert or participation with them, or either of them, and *all persons with actual notice of this Judgment*. . . ." (Italics added.) Cochran contends in effect that the italicized language makes the injunction unconstitutionally overbroad. Cochran is a party and is specifically named in the injunction. He "therefore lack[s] standing to challenge a portion of the [injunction] applying to persons who are not parties." (*Madsen*, *supra*, 512 U.S. at p. — [114 S.Ct. 2516, 2530].)

Cochran argues in effect that he cannot be enjoined on the basis of what Operation Rescue did at the clinic, while Operation Rescue insists it should not be held responsible for how Cochran acted vis-à-vis Dr. O. Cochran testified that he has contributed money to Operation Rescue, receives mailings from Operation Rescue, and attended rallies and rescues (including those at this clinic) organized by Operation Rescue. When asked on cross-examination "You've been involved with that organization for . . . ?" Cochran answered "For a few weeks." This is enough to justify treating Cochran as either a member of Operation Rescue, or as sufficiently associated with it that he is bound by the injunction against that entity. (*In re Berry* (1968) 68 Cal.2d 137, 155-156; 6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, §§ 317-318, pp. 269-270.)

Finally, appellants attack a number of the trial court's findings on the ground that they are not supported by substantial evidence. We do not investigate this claim because: (1) they did not set forth all of the relevant evidence in their briefs (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888), and (2) none of the findings

are essential to the judgment (*Leonard v. Fallas* (1959) 51 Cal.2d 649, 653).

Those portions of the judgment enjoining appellants from: (a) coming within 250 feet of Dr. O.'s residence, and (b) "[a]pproaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached" are reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. The judgment is affirmed in all other respects. The parties shall bear their respective costs.

/s/ Poché, J.

ANDERSON, P.J., and REARDON, J., concur.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed Mar. 13, 1992]

Case No. C92 0988 SAW

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, and JOHN D.A. BRIDGES,

Defendants.

[Filed Mar. 13, 1992]

Case No. C92 0988 SAW

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Operation Rescue of California, an unincorporated association of individuals, by its attorney, Richard Katerndahl, Esq., and counsel for plaintiffs have stipulated in open court to the issuance of this restraining order.

1. Defendants Operation Rescue of California and all persons who have participated in its rallies and other activities, including Ken Reed and Jeff White, their agents, officers, employees and representatives and all persons acting in concert or participation with them or with actual notice of this order are restrained and enjoined as follows:

(a) Defendants shall not threaten, strike, or make physical contact with Dr. Ostovar or his family members;

(b) Defendants shall not keep Dr. Ostovar or his family members under surveillance;

(c) Defendants shall not follow Dr. Ostovar or his family members;

(d) Defendants shall not telephone Dr. Ostovar or his family members;

(e) Defendants shall not block Dr. Ostovar's or his family members' movements at home, in public places or thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) Defendants shall not take any photographs or videotapes of Dr. Ostovar, his family members, or any person accompanying or assisting him as he arrives at or departs from his places of employment or home;

(g) Defendants shall stay at least 30 feet away from Dr. Ostovar and his family members;

(h) Defendants shall not disturb the peace or otherwise violate any local or state laws, regulations, or ordinances; and

(i) Defendants shall not protest, picket, march, display signs, or engage in any other anti-abortion protest activity in front of Dr. Ostovar's residence in San Mateo, California.

2. The Court further orders that Defendants, and each of them, and their agents, employees, representatives, and all persons acting

in concert or participation with them or with actual notice of this order, are restrained and enjoined from committing or furthering the commission of any and all of the following acts:

(a) Entering or blocking or obstructing any other person's ingress to or egress from Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff at 2211 Palm Avenue, San Mateo, California;

(b) Blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(c) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic buildings;

(d) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakeably clear that he or she does not wish to be approached;

(e) Shouting, chanting, or otherwise producing loud noises which can be heard within said Clinic;

(f) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic;

(g) Disturbing the peace or otherwise violating any local or state laws, regulations, or ordinances.

3. This Court orders that no person who has notice of this order shall fail to comply with its letter and spirit nor shall any person subvert the letter or spirit by any sham, indirection, or other artifice.

4. Defendants shall show cause why a preliminary injunction should not be issued enjoining Defendants, and their agents, officers, employees, and representatives, and all persons acting in concert or participation with them, from committing any of the

acts set forth in Paragraphs 1 and 2 above during the pendency of this action.

5. This order shall be and remain in effect until such time as the Court has issued a further order after conducting a hearing on the Order to Show Cause with respect to plaintiffs' motion for preliminary injunction and the Order to Show Cause has been decided.

6. The hearing on the Order to Show Cause shall be held on March 26, 1992 before this Court at 2:15 p.m. or as soon thereafter on that day as counsel can be heard.

7. Plaintiffs shall forthwith post a bond in the amount of $1000 (one thousand dollars).

IT IS SO ORDERED.

Date: March 13, 1992 at 2:55 p.m.

/s/ Hon. Stanley A. Weigel

U.S. District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed Mar. 17, 1992]

[Re-entered Apr. 17, 1992*]

Case No. C92 0988 SAW

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, and JOHN D.A. BRIDGES,

Defendants.

ORDER GRANTING TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AGAINST ALL DEFENDANTS EXCEPT OPERATION RESCUE

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* [The Court modified its order of March 17, 1992 by interlineating changes within that order. Bracketed bold text indicates text before revision, bracketed italic indicates text as revised.]

Having considered the application of plaintiffs Planned Parenthood Association of San Mateo County, Planned Parenthood Alameda/San Francisco, and Nader Ostovar for a temporary restraining order and order to show cause as against defendants Youth for America, Ken Reed, Jeff White, Kathryn Short, Bryan Howard Longworth, Michelle Renee Mueller, Dagmar Merari Torres, Mike Curtis Powell, Kimberly Alvarenga, Mary Lee Smedley, David Douglas FUller, Daniel Alfred Silva, Jude Francis Vos, Patrick Joseph McKenna, Michael Christian Ross, Stanford Abner Warner, Martin Munoz, Steve Butler and John D.A. Bridges, the Court finds that good cause exists to grant the application. The Court finds further as follows:

(A) *Irreparable injury*: As required by Rule 65 of the Federal Rules of Civil Procedure, the supporting declarations submitted by plaintiffs set forth specific facts showing that immediate and irreparable injury, loss, or damage will result to plaintiffs unless this application is granted. Specifically, the injuries include impediments to the right of plaintiffs' patients to an abortion and the right to travel to obtain an abortion. The defendants have also hindered plaintiffs' ability to provide abortions and other medical services to their patients. Plaintiffs' staff, including Dr. Ostovar, have also been physically confined, subjected to ongoing harassment and have suffered emotional distress because of defendants' activities. The plaintiffs have also been forced to expend resources and labor dealing with the defendants' harassment and trespasses and may be forced to discontinue abortions at the San Mateo clinic. These injuries are continuing and irreparable because no ascertainable amount of damages would adequately compensate plaintiffs for this harm.

(B) *Notice to Defendants*: As required by Rule 65 of the Federal Rules of Civil Procedure, the Declaration of Enid Van Hoven in support of this application certifies in writing that Plaintiffs gave or attempted to give all defendants notice of this hearing. Paragraph 6(c)(2) of that Declaration states that notice of the hearing was provided to defendants Daniel Silva, Stanford Warner, Steven Butler,

Jeff White, Michelle Mueller, Mike Powell, Kimberly Alvarenga, Mary Lee Smedley, David Fuller, Jude Vos, Michael Ross, Martin Munoz, John Bridges, and Youth for America. To the extent that notice was not given to defendants Dagmar Torres, Patrick McKenna, Bryan Longworth, Ken Reed, and Kathryn Short (as identified in Paragraph 6(c)(3) of that Declaration), this order shall be granted without notice because plaintiffs have made diligent and reasonable efforts to effect notice, but were unable to locate those defendants.

The Court therefore orders that:

1. Defendants Youth for America, Ken Reed, Jeff White, Kathryn Short, Bryan Howard Longworth, Michelle Renee Mueller, Dagmar Merari Torres, Mike Curtis Powell, Kimberly Alvarenga, Mary Lee Smedley, David Douglas Fuller, Danielle Alfred Silva, Jude Francis Vos, Patrick Joseph McKenna, Michael Christian Ross, Stanford Abner Warner, Martin Munoz, Steve Butler and John D.A. Bridges, their agents, officers, employees and representatives and all persons acting in concert or participation with them [or][*and*] with actual notice of this order are restrained and enjoined as follows:

(a) Defendants shall not threaten, strike, or make physical contact with Dr. Ostovar or his family members;

(b) Defendants shall not keep Dr. Ostovar or his family members under surveillance;

(c) Defendants shall not follow Dr. Ostovar or his family members;

(d) Defendants shall not telephone Dr. Ostovar or his family members;

(e) Defendants shall not block Dr. Ostovar's or his family members' movements at home, in public places or thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) Defendants shall not take any photographs or videotapes of Dr. Ostovar, his family members, or any person accompanying or assisting him as he arrives at or departs from his place of employment or home;

(g) Defendants shall stay at least 30 feet away from Dr. Ostovar and his family members;

(h) Defendants shall not disturb the peace or otherwise violate any local or state laws, regulations, or ordinances; and

(i) Defendants shall not protest, picket, march, display signs, or engage in any other anti-abortion protest activity [**in front**][*within 250 feet*] of Dr. Ostovar's residence in San Mateo, California.

2. The Court further orders that Defendants Youth for America, Ken Reed, Jeff White, Kathryn Short, Bryan Howard Longworth, Michelle Renee Mueller, Dagmar Merari Torres, Mike Curtis Powell, Kimberly Alvarenga, Mary Lee Smedley, David Douglas Fuller, Danielle Alfred Silva, Jude Francis Vos, Patrick Joseph McKenna, Michael Christian Ross, Stanford Abner Warner, Martin Munoz, Steve Butler and John D.A. Bridges, and each of them, and their agents, employees, representatives, and all persons acting in concert and participation with them [**or**][*and*] with actual notice of this order, are restrained and enjoined from committing or furthering the commission of any and all of the following acts:

(a) Entering or blocking or obstructing any other person's ingress to or egress from Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff at 2211 Palm Avenue, San Mateo, California;

(b) Blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(c) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic buildings;

(d) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakeably clear that he or she does not wish to be approached;

(e) Shouting, chanting, or otherwise producing loud noises which can be heard within said Clinic;

(f) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic;

(g) Disturbing the peace or otherwise violating any local or state laws, regulations, or ordinances; and

(h) Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property located at 2205 and 2211 Palm Avenue, San Mateo or within fifteen (15) feet of such property;

3. This Court orders that no person who has notice of this order shall fail to comply with its letter and spirit nor shall any person subvert the letter or spirit by any sham, indirection, or other artifice.

4. Defendants shall show cause why a preliminary injunction should not be issued enjoining Defendants, and their agents, officers, employees, and representatives, and all persons acting in concert or participation with them, from committing any of the acts set forth in Paragraphs 1 and 2 above during the pendency of this action.

5. This order shall be and remain in effect until such time as the Court has [**conducted a hearing on the Order to Show Cause with respect to plaintiffs' motion for preliminary injunction and the Order to Show Cause has been decided.**][*rendered final judgment in this case.*]

6. The hearing on the Order to Show Cause shall be held on March 26 1992 at 2:15. Defendants' opposition papers shall be served and filed on or before March 20, 1992; plaintiffs' reply papers shall be served and filed at or before noon March 23, 1992.

7. Plaintiffs shall forthwith post a bond in the amount of $1000.00 (one thousand dollars).

IT IS SO ORDERED.

Date: March 17, 1992 at 2:12 p.m.

/s/ Hon. Stanley A. Weigel

U.S. District Court Judge

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

[Filed: Sep. 8, 1993]

No. 384995

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D.A. BRIDGES, AND ROB COCHRAN,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

This cause came on for hearing on September —, 1993, upon the *ex parte* application of plaintiffs Planned Parenthood Association of San Mateo County, Planned Parenthood Alameda/San Francisco, and Nader Ostovar for a temporary restraining order and order to show cause regarding preliminary injunction. Upon reading the memorandum of points and authorities submitted in support of the application, and having considered the declarations

and evidence and heard the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

In accordance with California Code of Civil Procedure sections 527 and 527.6, defendants, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of this order shall:

(a) not threaten, strike, or make physical contact with Dr. Ostovar or his family members;

(b) not keep Dr. Ostovar or his family members under surveillance;

(c) not follow Dr. Ostovar or his family members;

(d) not telephone Dr. Ostovar or his family members;

(e) not block Dr. Ostovar's or his family members' movements at home, in public places or thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) not take any photographs or videotapes of Dr. Ostovar, his family members, or any person accompanying or assisting him as he arrives at or departs from his places of employment or home;

(g) stay at least 30 feet away from Dr. Ostovar and his family members; and

(h) stay at least 250 feet away from Dr. Ostovar's residence in San Mateo, California.

IT IS FURTHER ORDERED THAT:

In accordance with California Code of Civil Procedure section 527, defendants, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of

this order, are temporarily restrained and enjoined from directly or indirectly:

(a) Entering or blocking or obstructing any other person's ingress to or egress from Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff at 2211 Palm Avenue, San Mateo, California;

(b) Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property located at 2205 and 2211 Palm Avenue, San Mateo (including the walkway at the front of the clinic building, the walkways and driveways on either sides of the clinic building, and the parking area behind the clinic building), or within fifteen [sic] (3) feet of such private property;

(c) Entering or blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(d) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic building;

(e) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached;

(f) Shouting, chanting, or otherwise producing loud noises which can be heard within said Clinic;

(g) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic.

IT IS FURTHER ORDERED THAT that Defendants, and each of them, appear before this Court at the Hall of Justice and Records, 401 Marshall Street, Redwood City, California, 94063, on the 21st day of September, 1993, at 9:00 o'clock AM, then and there to show cause, if any they have, why an Order should

not be entered granting plaintiffs a preliminary injunction in the terms of the Temporary Restraining Order issued above.

IT IS FURTHER ORDERED THAT this Order shall be served upon Defendants or their counsel within 5 business days of this Order, or such time as may be extended by this Court; and

IT IS FURTHER ORDERED THAT Defendants shall have to and including September 17, 1993, within which to file with the Clerk of this Court and Personally or FAX serve upon Plaintiffs any opposing papers.

IT IS SO ORDERED.

Dated: Sep. 8, 1993

/s/ L. T. Stevens

Judge of the Superior Court

County of San Mateo

APPENDIX E

[SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN MATEO]

No. 384995

LAW AND MOTION ASSIGNMENT CALENDAR

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, et al.,
Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA YOUTH FOR AMERICA
Defendants.

ORDER TO SHOW CAUSE:
PRELIMINARY INJUNCTION

Gil Soffer, Attorney for Plaintiff

Decision: Preliminary Injunction to issue identical in scope and terms to present Temporary Restraining Order except that the zone at 2211 Palm Avenue shall extend 15 feet, rather than 3 feet, from the property lines of Plaintiff Planned Parenthood/San Mateo. The order shall be in effect for all named, served Defendants except the Defendant Butler as to whom there is insufficient evidence. Attorneys for Plaintiffs to prepare an order and injunction consistent with this decision and submit the same for signature by 4:30 PM, Friday, October 22, 1993.

October 20, 1993

/s/ W. Harrington

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

[Filed: Nov. 9, 1993]

No. 384995

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D.A. BRIDGES, and ROB COCHRAN,

Defendants.

ORDER AND PRELIMINARY INJUNCTION

This cause came on for hearing on September 21, 1993, and October 20, 1993, upon the *ex parte* application of plaintiffs Planned Parenthood Association of San Mateo County, Planned Parenthood Alameda/San Francisco, and Nader Ostovar for a preliminary injunction. Upon reading the memorandum of points and authorities submitted in support of and in opposition to the application, and having considered the declarations and evidence and heard the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

In accordance with California Code of Civil Procedure sections 527 and 527.6, Rob Cochrane and Operation Rescue of California, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of this order shall:

(a) not threaten, strike, or make physical contact with Dr. Ostovar or his family members;

(b) not keep Dr. Ostovar or his family members under surveillance;

(c) not follow Dr. Ostovar or his family members;

(d) not telephone Dr. Ostovar or his family members;

(e) not block Dr. Ostovar's or his family members' movements at home, in public places or thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) not take any photographs or videotapes of Dr. Ostovar, his family members, or any person accompanying or assisting him as he arrives at or departs from his places of employment or home;

(g) stay at least 30 feet away from Dr. Ostovar and his family members;

(h) stay at least 250 feet away from Dr. Ostovar's residence in San Mateo, California.

IT IS FURTHER ORDERED THAT:

In accordance with California Code of Civil Procedure section 527, Rob Cochrane and Operation Rescue of California, and each of them, and their agents, employees, representatives, and any persons in active concert or participation with them, or any of them, and all persons with actual notice of this order, are restrained and enjoined from directly or indirectly:

(a) Entering or blocking or obstructing any other person's ingress to or egress from Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff at 2211 Palm Avenue, San Mateo, California;

(b) Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property located at 2205 and 2211 Palm Avenue, San Mateo (including the walkway at the front of the clinic building, the walkways and driveways on either sides of the clinic building, and the parking area behind the clinic building), or within fifteen (15) feet of such private property;

(c) Entering or blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(d) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic building;

(e) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached;

(f) Shouting, chanting, or otherwise producing loud noises which can be heard within said Clinic;

(g) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic.

IT IS SO ORDERED.

Dated: Nov. 9, 1993

/s/ W. Harrington

Judge of the Superior Court

County of San Mateo

APPENDIX G

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

[Filed: Feb. 17, 1995]

No. 384995

PLANNED PARENTHOOD OF SAN MATEO COUNTY, et al.

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, ET AL.,

Defendants.

Decision:

Hearing in the above entitled matter having been held and the matter submitted to the Court for consideration and decision, and the Court now being fully advised in the premises herein renders its decision and said written decision is ordered filed and referred to as if fully set forth herein.

See attached.

384995

PLANNED PARENTHOOD OF SAN MATEO V. OPERATION RESCUE OF CALIFORNIA

Trial: September 27-29, 1994

Submitted: December 1, 1994 (resubmitted with addn'l authorities 12/15/94)

Decision:

Plaintiffs' petition for a permanent injunction is granted on the same terms as the preliminary injunction heretofore issued in this proceeding.

The court's view of the Palm Avenue offices of the Plaintiff San Mateo in connection with the preliminary injunction application in the fall of 1993 continues to be determinative that the 15 foot "barrier" continues to be a necessary provision of the injunction, in that the plaintiff San Mateo's premises is very narrowly set back from Palm Avenue [the building walls are less than 6 feet from the street]. Palm Avenue has a slight double curve at that point, which Plaintiff's office building follows. The vehicular through traffic does not have a clear view around the curve, and this fact, taken with the narrow side walk, creates an extreme traffic hazard with respect to any congregation of pedestrians on the Plaintiff's side of Palm Avenue.

The court has read and considered the Murray case opinion submitted on behalf of Defendants, in particular reference to the New Jersey Supreme Court's ruling reducing to 100 feet from 250 feet, the barrier imposed by the New Jersy trial court against picketing outside Dr. Murray's home. Dr. Murray lives in a single family residence, and Dr. Ostovar's home is in a large, almost block long apartment house complex, in which a substantial number of other persons have apartments. While the other residents of that apartment house are not participants in this action, this court is not persuaded to reduce the distance from the 250 feet established

in respect to the temporary injunction, which is a reasonable balance of the constitutional rights of the defendants to convey their message without unduly interfering with the rights to a peaceful home, of Dr. Ostovar and his family, as well as the other uninvolved residents of the apartment building.

February 13, 1995

/s/ W. H. Harrington

APPENDIX H

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

[Filed Apr. 24, 1995]

Case No. 384995

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO, and NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D. A. BRIDGES, and ROB COCHRAN,

Defendants.

STATEMENT OF DECISION PURSUANT TO CRC 232(C)

This matter was tried to the Court on September 27, 28, and 29, 1994, after which the parties submitted written closing argument. Having considered the evidence submitted by the parties[1] and the written arguments of counsel, and having personally viewed the premises at issue, the Court finds as follows:

---

[1] Six witnesses testified on behalf of plaintiffs. Defendant Rob Cochran testified on his own behalf. Defendant Operation Rescue of California offered no witnesses or evidence, but confined itself to cross-examining plaintiffs' witnesses.

A. *Planned Parenthood's San Mateo Clinic*

1. Plaintiff Planned Parenthood Association of San Mateo County ("PPSM") operates a medical clinic at 2211 Palm Avenue, San Mateo, California (the "San Mateo Clinic"). Among the medical services provided at the San Mateo Clinic are abortions. PPSM owns the building at 2211 Palm Avenue and the adjoining building, 2205 Palm Avenue. The buildings share the private parking lot behind the clinic with two neighboring businesses, and signs are posted identifying the lot as private.

2. Defendant Operation Rescue of California ("Operation Rescue") has organized four "rescues" at the San Mateo Clinic. Defendant Cochran testified that a "rescue" is designed to prevent access to the clinic and prevent patients from having their scheduled abortions.

a. The first rescue occurred in July 1988.

b. The second rescue occurred in July 1990. Dozens of protesters massed outside the clinic, blocked the entrances for several hours, and prevented the provision of regularly scheduled services. The protesters carried an Operation Rescue banner and many wore Operation Rescue T-shirts.

c. The third rescue occurred on February 15, 1992. Two admitted members of Operation Rescue feigned an abortion appointment to gain access to the clinic through the rear entrance, rushed through the clinic to the front door, and let in fourteen other Operation Rescue members who were waiting in front of the clinic. The protesters occupied the clinic's waiting room, directly blocking the front door and all interior doors, and refused to leave. An additional forty members of Operation Rescue protested outside the clinic, blocking entrances to the clinic and effectively preventing patients and staff from exiting or entering the clinic. As a result of the rescue, regularly scheduled services had to be canceled and rescheduled.

d. The fourth rescue occurred on July 17, 1993, four months after the United States District Court for the Northern District of California had entered a preliminary injunction barring defendants from trespassing on and obstructing access to PPSM's private property. Over sixty protesters participated and all entrances to the clinic were blocked, with the result that normal clinic operations were temporarily suspended. Again, many protesters wore Operation Rescue T-shirts or sweatshirts and carried Operation Rescue signs.

3. Defendant Rob Cochran personally participated in the July 1990 and July 1993 rescues.

4. In addition to the four rescues, beginning in February 1992 Operation Rescue has sponsored, and its members have participated in, regular Saturday morning protests at the San Mateo clinic.

5. Cochran has personally participated in the regular Saturday morning protests at the San Mateo clinic.

6. During the course of the rescues and the weekly protests, the protesters, including defendant Cochran and members of defendant Operation Rescue, have committed numerous tortious acts not protected by the first amendment, as follows:

7. *Trespass*. Trespass is the entry, without privilege or consent, upon property which is in the exclusive possession of another. *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 230 (1982). The "only intent required is an intent to enter, regardless of the actor's motivation." *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1480-81 (1986).

a. During the rescues described above, Operation Rescue members and defendant Cochran intentionally entered and/or blocked access to PPSM's private property.

b. In addition, Operation Rescue members and Cochran have committed repeated acts of trespass by obstructing ingress to

and egress from the San Mateo Clinic during their regular sidewalk protest activities. *See Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 626 (N.D. Cal. 1991) ("*PP San Mateo*"); *Feminist Women's Health Center v. Blythe*, ___ Cal. App. 4th ___, 1995 Cal. App. LEXIS 218 (Mar, 8, 1995) ("*Blythe*"); *Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc. v. Aakhus*, 14 Cal. App. 4th 162 (1993) ("*PP Santa Barbara*"); *Planned Parenthood of San Diego & Riverside Counties v. Wilson*, 234 Cal. App. 3d 1662, 1665-66, 1674 (1991) ("*PP San Diego*"); *Allred v. Shawley*, 232 Cal. App. 3d 1489, 1493-95 (1991); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 237-38, 248-50 (1989) ("*Scully*").

c. PPSM has never consented to the above conduct, and defendants have not argued that any privilege applies.

8. *False Imprisonment.* False imprisonment is "the unlawful violation of the personal liberty of another" by compelling him or her, for some appreciable length of time, to stay or go somewhere against his or her will. Cal. Penal Code § 236; *Parrott v. Bank of America*, 97 Cal. App. 2d 14, 22 (1950); 5 B. Witkin, Summary of California Law, Torts § 378, p. 463 (8th ed. 1988).

a. During the February 15, 1992 rescue, defendant Operation Rescue trapped approximately seven individuals in the clinic waiting room for over two hours. The individuals were effectively prevented from leaving until the police arrived.

9. *Tortious Harassment.* California courts have long recognized a common law basis for enjoining harassment masquerading in the guise of free speech. *See In re Coleman*, 12 Cal. 3d 568 (1974); *Blythe*, 1995 Cal. App. LEXIS 218, *46; *PP San Diego*, 234 Cal. App. 3d at 1665-66; *Allred*, 232 Cal. App. 3d at 1493-95; *Scully*, 208 Cal. App. 3d at 237-38, 248-50.

a. During the weekly protests, defendant Cochran has repeatedly hounded patients, running toward them, following them down the

sidewalk as they approach the clinic entrance, haranguing them loudly, and thrusting literature at them even after they have indicated that they do not want it.

b. Defendant Operation Rescue's members have engaged in a wide range of similar harassing activities.

c. Before the federal preliminary injunction issued and the protesters moved across the street, the noise made by the protesters could be heard inside the clinic.

d. The harassment of individuals outside the clinic, however, continued after the federal preliminary injunction issued. Defendant Cochran has also admitted to approaching patients inside the court-ordered buffer zone on several occasions.

e. Defendants' conduct has effectively forced PPSM's patients to walk a gauntlet of intimidation to reach the clinic. It has frightened them, reduced them to tears, and caused them severe emotional upset. Patients' heightened stress levels, in turn, have complicated their medical procedures. Patients have required more counseling and, on occasion, more medication before procedures are performed. Others have canceled or delayed their appointments to avoid the protesters. The evidence showed that delaying an abortion procedure increases the likelihood of complications and may force the woman to undergo the more complicated procedure used in second trimester abortions rather than the simpler first trimester procedure.

f. Defendants' gauntlet has also affected PPSM's staff, increased their levels of fear and stress and directly affecting their work performance.

10. *Intentional Infliction of Emotional Distress.* A cause of action for intentional infliction of emotional distress requires: (1) outrageous conduct; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional suffering. *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593

(1979); *Bogard v. Employers Cas. Co.*, 164 Cal. App. 3d 602, 616 (1985).

a. Both Cochran and Operation Rescue admitted that Saturdays were the days chosen for protests because abortions were offered on Saturdays and, in consequence, patients coming to the clinic would likely be pregnant and seeking to obtain abortions. Thus, the Court finds defendants knew the targeted patients would be particularly vulnerable to their campaign of harassment and intimidation.

b. In addition, the Court finds defendants knew that, in light of increasing violence directed at abortion clinics nationwide, PPSM's staff would be especially vulnerable targets for their harassment.

c. Defendants' above-described harassing conduct, directed at those known to be physically and emotionally vulnerable, was and is outrageous. *Agarwal v. Johnson*, 25 Cal. 3d 932, 946 (1979).

d. As described above, defendants' conduct was intended to cause, and did cause, PPSM's patients and staff severe emotional suffering.

11. *Intentional Interference with Economic Advantage.* This cause of action requires: (1) an economic relationship with the probability of future economic benefit; (2) defendants' knowledge of the relationship; (3) intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) proximate causation of economic harm. *Youst v. Longo*, 43 Cal. 3d 64, 71 n.6 (1987).

a. PPSM has an economic relationship with patients who seek and pay for counseling and reproductive health services, and defendants are aware of this relationship.

b. Defendants have admitted that they organized their rescues and weekly protest activities so as to have maximum impact on PPSM's ability to provide abortions to patients seeking them. In this way, defendants intentionally acted to disrupt PPSM's rela-

tionship with its patients. *See Women's Health Care Services P.A. v. Operation Rescue*, 773 F. Supp. 258, 268-69 (D. Kan. 1991).

c. Defendants' activities worked actual disruption. The rescues caused abortion clinics to be delayed or canceled entirely. The weekly protest activities caused many individual patients to delay or cancel their scheduled appointments. PPSM has incurred economic loss as a result of canceled appointments, and will continue to incur such losses unless defendants are enjoined. *Roe v. Operation Rescue*, 710 F. Supp. 586 (E.D. Pa. 1989), *aff'd in part and rev'd in part on other grounds*, 919 F.2d 857 (3d Cir. 1990); *Uptown Enter. v. Strand*, 195 Cal. App. 2d 45,-52 (1961).

d. As a result of defendants' activities, PPSM has also incurred other economic losses. PPSM has spent nearly $100,000 in hiring and training additional personnel, additional training for current staff, and recruiting and training clinic defense volunteers.

12. *Interference with Constitutional Right to Privacy*. The privacy right guaranteed by Article I, section 1 of the California Constitution encompasses the right to choose whether or not to bear a child, the right to obtain an abortion, and a medical patient's right to be left alone. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 275 (1981); *Scully*, 208 Cal. App. 3d at 241; *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 776 (1986).

a. By intimidating and harassing PPSM's patients and staff, disrupting and halting the provision of medical services at the San Mateo Clinic, and creating noise levels that jeopardize PPSM's ability to provide medical services in a safe environment, defendants have interfered with the exercise of all of the above rights and choices. *See Blythe*, 1995 Cal. App. LEXIS 218, *14.

13. The Court finds that the above-described activities have irreparable injured PPSM and its patients, by interfering with PPSM's ability to conduct its lawful business on its private property, and with the ability of its staff to provide quality medical care

to patients. By upsetting staff and patients, defendants' conduct increases the risk of complications during anesthesia, the abortion procedure, and post-operative recovery. *See Blythe*, 1995 Cal. App. LEXIS 218, *14-15. Other patients who have made appointments to receive various medical services, have been intimidated from coming to the San Mateo Clinic. PPSM has been forced to recruit, hire and train personnel to guard the San Mateo Clinic.

14. In addition, defendants' interference with the right of PPSM's patients to obtain abortions constitutes irreparable injury. *Pro-Choice Network of Western N.Y. v. Project Rescue*, 799 F. Supp. 1417, 1428 (W.D.N.Y. 1992), *aff'd in part and rev'd in part sub nom. Pro-Choice Network v. Schenk*, 34 F.3d 130 (2d Cir. 1994), *withdrawn and reh'g en banc granted*, 1994 WL 480642 (Dec. 30, 1994); *New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y.), *aff'd* 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

15. The Court finds that irreparable injury to PPSM and its patients will continue unless defendants' tortious conduct—trespassing on and obstructing access of persons and vehicles to PPSM's private property, touching or threatening individuals entering and leaving the San Mateo Clinic, and producing noise that can be heard inside the Clinic—is enjoined.

16. In addition, PPSM has requested the imposition of a fifteen-foot speech free zone around its private property located at 2205 and 2211 Palm Avenue. The Court finds that a fifteen-foot zone is justified by the evidence and will burden no more speech than necessary to serve significant state interests. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994).

17. The state "has a strong interest in ensuring public safety and order, [and] in promoting the free flow of traffic on public streets and sidewalks." *Madsen*, 114 S. Ct. at 2526. PPSM's Palm Avenue premises are very narrowly set back (less than six feet) from the street, which has a slight double curve in it at that point. As a result, vehicular traffic does not have a clear view around the

curve. The combination of narrow sidewalk and obstructed view means that any congregation of pedestrians in front of the San Mateo Clinic creates an extreme traffic hazard. The evidence at trial showed that this hazard is a real one. The weekly protests at the San Mateo Clinic, and particularly the four "rescues" staged by Operation Rescue, have interfered with the free flow of traffic on the sidewalk in front of the clinic, obstructed the passage of vehicles seeking to turn off of the street into the clinic's driveway, and created a potentially dangerous distraction for passing drivers. The evidence also showed that the protesters, including defendant Cochran, have walked into the street to approach, and thrust anti-abortion literature at, passing cars.

18. The state also has a strong interest in ensuring the right to obtain lawful medical treatment in privacy and without intrusion. *Madsen*, 114 S. Ct. at 2526; *Thornburgh*, 476 U.S. at 776; *Blythe*, 1995 Cal. App. LEXIS 218, *26-27.

19. Finally, the state has a strong interest in safeguarding the health and safety of the San Mateo Clinic's patients, and in ensuring that the medical procedures performed at the Clinic, including abortions, are performed under circumstances that insure maximum safety for the patient. *See Madsen*, 114 S. Ct. at 2526; *Blythe*, 1995 Cal. App. LEXIS 218, *27, *30. The evidence showed that the noise level created by the protesters and the acrimonious face-to-face confrontations they initiated have seriously distressed PPSM's patients and staff, with demonstrable effects on the performance/receipt of medical services inside the clinic. Defendants' activities have created an atmosphere that is in no way conducive to the delivery of safe medical care. To the contrary, their conduct greatly increases the risks of the abortion and other procedures performed at the San Mateo Clinic. *See Blythe*, 1995 Cal. App. LEXIS 218, *14-15.

20. Finally, the Court notes that a less restrictive injunction (without the 15-foot zone) was issued against Operation Rescue in the federal court action, to no avail. *See Madsen*, 114 S. Ct.

at 2527. The evidence showed that Operation Rescue members repeatedly violated the less restrictive order's provisions.

21. The 15-foot zone protects the above interests while still allowing defendants to make their views on abortion known. The protesters can easily be seen and heard by patients, staff and passers-by from their vantage point on the sidewalk across the narrow street from the San Mateo Clinic. The only tactic they cannot employ is face-to-face confrontation. However, the first amendment does not entitle defendants to hold PPSM's staff and patients hostage until they have heard everything defendants want to say. *Rowan v. Post Office Depot.*, 397 U.S. 728, 737-38 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit. . . . [N]o one has a right to press even 'good' ideas on an unwilling recipient"); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). Defendants have never argued that they cannot be seen and heard from across the street. The 15-foot zone amply preserves defendants' first amendment rights. *Madsen*, 114 S. Ct. at 2527; *Blythe*, 1995 Cal. App. LEXIS 218, *25 ("The injunction simply insulates the clinic's patients from close physical contact with defendants, not from the content of their speech."), *28-29.

22. Finally, PPSM has requested that the injunction prohibit "[a]pproaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached,." The evidence, which showed that individuals approaching the San Mateo Clinic have been hounded, intimidated, and harassed by defendants and their affiliates, justifies such a provision. A "no approach" provision will not prevent defendants from being seen and making their views heard, but only from engaging in harassing conduct that the first amendment does not protect. *See, e.g., Van Nuys Pub. Co. v. Thousand Oaks*, 5 Cal. 3d 817, 9825 (1971). Thus, this provision, too, burdens no more speech than necessary to protect a significant state interest—here, the right of citizens to walk down

public streets and approach lawful business without being stalked, intimidated and harassed.

23. Defendants argue that the "no approach" provision is unconstitutionally vague. The Court rejects that argument. Unlike the language struck down in *Madsen*, 114 S. Ct. at 2529, *United Food & Comm'l Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and other cases cited by defendants, the proposed language, which requires the targeted individual to give unambiguous indication of a desire to be left alone, is clear enough that a person "of common intelligence" need not "guess at its meaning [or] differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also Rowan v. Post Office Dept.*, 397 U.S. 728, 740 (1970); *PP San Mateo*, 765 F. Supp. at 626 (granting a similarly worded "no approach" provision).

B. *Dr. Nader Ostovar's Apartment Complex*

1. Dr. Nader Ostovar performs obstetric and gynecological services, including abortion services, at several clinics operated by plaintiff Planned Parenthood Alameda/San Francisco ("PPA/SF").

2. Dr. Ostovar resides in a private apartment complex in San Mateo, California. In February 1992, anti-abortion protests began outside the apartment complex.

3. The protests at Dr. Ostovar's apartment complex were nominally sponsored by Youth for America. The evidence showed, however, that Youth for America is a youth anti-abortion group that is affiliated with Operation Rescue and uses Operation Rescue's newsletters to advertise its activities. Operation Rescue presented no witnesses who testified to the contrary. Accordingly, the Court finds that the protest activities at Dr. Ostovar's apartment complex had Operation Rescue's sponsorship and approval.

4. The protesters, including defendant Cochran and members of Operation Rescue, committed numerous tortious acts not protected by the first amendment, as follows:

5. *Trespass* (see Part A, ¶ 7 above).

a. On February 15, 1992, after Dr. Ostovar had come out of the building but had been prevented from driving to work (see ¶ 6, below), several protesters entered the private grounds of the apartment complex and prevented Dr. Ostovar from reentering the building until he had promised not to go to the clinic that day.

b. Later that day, some of the protesters entered the private, secure garage at the apartment complex and let the air out of the tires of Dr. Ostovar's car. Admitted Operation Rescue member Steve Butler later told Dr. Ostovar that he and other protesters had been responsible for the vandalism.

c. On February 29, 1992, Butler and admitted Operation Rescue member John Bridges gained access to Dr. Ostovar's apartment building and came to his apartment door.

d. On March 21, 1992, large numbers of protesters gathered on the private walkway leading from the sidewalk to Dr. Ostovar's apartment building.

e. Dr. Ostovar has never consented to the above activities, and defendants have not argued that any privilege applies.

6. *False Imprisonment* (see Part A, ¶ 8 above).

a. On February 15, 1992, when Dr. Ostovar came out of his apartment building, got into his wife's car, and attempted to drive to the clinic, the protesters, including admitted Operation Rescue member Butler, lay down in front of and behind the car and prevented him from moving it.

7. *Tortious Harassment* (see Part A, ¶ 9 above). In addition, Cal. Civ. Proc. Code § 527.6 prohibits knowing and willful harassment targeted at a particular individual.

a. For a period of several months, until a federal preliminary injunction issued, the protesters engaged in conduct that amounted to a sustained campaign of harassment and intimidation against Dr.

Ostovar, which included: picketing his apartment complex, calling him "Dr. Dahmer", following him to work, letting the air out of his tires, leaving notes on his car, telephoning him at home, and coming to the door of his privately secured apartment.

b. As a result of the above-described activities, Dr. Ostovar experienced fear for his personal safety to the degree that he had difficulty sleeping at night, and required a police escort before he would leave his building to go to work. Dr. Ostovar's wife became distraught, and required Planned Parenthood staff members to stay in the apartment with her while the protesters were outside.

c. As described in ¶¶ 5-6, above, members of defendant Operation Rescue participated in the harassing activities.

d. Defendant Cochran admits having personally participated in protest activities at Dr. Ostovar's apartment complex on at least one occasion.

8. *Intentional Infliction of Emotional Distress* (see Part A, ¶ 10 above).

a. Defendants' campaign of harassment and intimidation against Dr. Ostovar was undertaken with the intention of causing him such distress that he would stop performing abortions. Defendant Operation Rescue admitted that targeted residential protest against doctors who perform abortions is one of its recommended tactics for "stopping abortion."

b. The campaign against Dr. Ostovar was continued with full knowledge that it was, in fact, causing him severe emotional suffering. Defendants knew how fearful Dr. Ostovar was, and knew he would not leave his residence to go to the clinic unless provided with a police escort to his car.

c. The Court finds that defendants' contact, directed as it was against an individual known to be suffering severe distress and with the hope of making him suffer more distress, was outrageous. *Agarwal*, 25 Cal.3d at 946.

9. *Intentional Interference with Economic Advantage* (see Part A, ¶ 11 above).

a. Dr. Ostovar and PPA/SF have economic relationships with their patients, and defendants are aware of those relationships.

b. Defendant Operation Rescue has admitted that its conduct toward Dr. Ostovar was deliberately designed to disrupt those relationships. It hoped to prevent him from going to the clinic on specific days, and ultimately to intimidate him from performing abortions at all.

c. On at least one occasion, defendants actually prevented Dr. Ostovar from leaving for the clinic at his regularly scheduled time.

d. As a result of the protests at his apartment complex, PPA/SF was forced to assign four staff members to Dr. Ostovar's residence every Saturday morning for several months.

10. *Interference with Constitutional Right to Privacy* (see Part A, ¶ 12 above).

a. By intimidating and harassing Dr. Ostovar, disrupting his provision of medical services to his and PPA/SF's patients, and jeopardizing his ability to provide those services safely, defendants have interfered with the constitutional right of his and PPA/SF's patients to choose and obtain an abortion.

11. Defendants' tortious activities have inflicted irreparable injury on Dr. and Mrs. Ostovar, by interfering with their rights to privacy and the peaceful enjoyment of their property, and by threatening Dr. Ostovar's lawful business.

12. Defendants' activities also have inflicted irreparable injury on Dr. Ostovar's patients, by impairing Dr. Ostovar's ability to perform and his patients' right to obtain safe abortions.

13. Finally, the above-described tortious activities have also irreparably injured PPA/SF, by forcing it to assign staff members to Dr. Ostovar's apartment complex every Saturday and by interfering

with its patients' right to obtain safe abortion services and thereby threatening its lawful business.

14. The Court finds that irreparable injury to the Ostovars, PPA/SF, and the affected patients will continue unless defendants' tortious conduct—trespassing on and obstructing access to Dr. Ostovar's private property and harassing and intimidating Dr. Ostovar—is enjoined.

15. In addition, Dr. Ostovar and PPA/SF have requested the imposition of a 250-foot speech free zone around Dr. Ostovar's apartment complex. The Court finds that a 250-foot zone is justified by the evidence and will burden no more speech than necessary to serve significant state interests. *Madsen*, 114 S. Ct. at 2525.

16. The evidence showed that defendants have obstructed the free flow of traffic into and out of Dr. Ostovar's apartment complex and on the adjoining sidewalk and street. Thus, the state's interests in safety, order, and the free and safe flow of traffic are implicated here as well. *Madsen*, 114 S. Ct. at 2526.

17. Defendants' conduct also jeopardizes the state's interest in protecting the freedom of Dr. Ostovar's and PPA/SF's patients to seek lawful medical services and to receive those services in a safe environment. *Madsen*, 114 S. Ct. at 2526; *Blythe*, 1995 Cal. App. LEXIS 218, *27.

18. Finally, the state has a paramount interest " 'in protecting the well-being, tranquility, and privacy of the home' "—an interest that is " 'of the highest order in a free and civilized society.' " *Frisby v. Schultz*, 478 U.S. 474, 484 (1987) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). Defendants have threatened this interest by effectively placing Dr. Ostovar's apartment complex under siege. Neither Dr. Ostovar nor his neighbors could enter or leave the complex—or even look out their front windows—without being bombarded with shouting, chanting, anti-abortion literature and placards, and graphic imagery.

19. Defendants suggest that the residential privacy of Dr. Ostovar's neighbors is none of the Court's concern. As the preceding paragraph demonstrates, that argument is not well taken. Defendants' conduct effectively made both the Ostovars and their neighbors a captive audience in their homes. The Court finds that the State's interest in residential privacy extends to preserving the privacy of Dr. Ostovar's neighbors.

20. Similarly, *Murray v. Lawson*, ___ A.2d ___, 1994 WL 680386 (N.J. 1994), which reduced a 250-foot zone around a single-family home to 100 feet, is inapposite here. Because Dr. Ostovar lives in a large apartment complex, not a private home, a 250-foot zone is necessary to ensure that defendants cannot station themselves in front of the complex. Thus the 250-foot zone burdens the least amount of speech necessary to protect the state interests at issue.

21. The 250-foot zone protects the above interests while still allowing defendants to make their views on abortion known by other means. The protesters can still mail leaflets to residents of the apartment complex, and may march through the neighborhood so long as they do not engage in the targeted picketing that the injunction prohibits. *See Frisby*, 487 U.S. 484-87; *see also City of San Jose v. Superior Court*, 32 Cal. App. 4th 330 ("[T]argeted picketing is a disfavored activity not entitled to a high level of First Amendment protection," and ordinance prohibiting targeted picketing within 300 feet of *any* private residence is a reasonable legislative choice that leaves ample alternative avenues for expressive activity). Thus, defendants' first amendment rights are amply protected. *Madsen*, 114 S. Ct. at 2527.

C. *Unclean Hands Defense*

Operation Rescue argues that plaintiffs should be denied the relief they seek for alleged misrepresentations made to the Court regarding the prior federal court proceeding. The Court finds this contention to be entirely without merit.

D. *Scope of Injunction*

1. The injunction binds defendants, all persons acting in concert or participation with them, and all persons with actual notice of the injunction. The Court rejects defendants' attempt to challenge the "actual notice" provision. As named parties to this lawsuit, they lack standing to raise such a challenge. *Madsen*, 114 S. Ct. at 2530.

2. Defendants imply that there is no evidence to support a finding that Operation Rescue and Cochran each took part in all of the unlawful acts alleged. Since the Court has found that each defendant committed or participated in some of the unlawful activity, both at the San Mateo Clinic and at Dr. Ostovar's apartment complex, whether *each* defendant participated in *all* such activity is irrelevant. *See Blythe*, 1995 Cal. App. LEXIS 218, *46- 49. In addition, as in *Blythe*, plaintiffs presented substantial evidence which suggested that Cochran and Operation Rescue members acted in concert.

E. *Conclusion*

In light of the foregoing findings, plaintiff's petition for a permanent injunction is granted on the same terms as the preliminary injunction previously issued in this matter. Judgment shall be entered accordingly.

DATED: Apr 21 1995

/s/ Hon. Walter H. Harrington

Judge of the Superior Court

APPENDIX I

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

[Filed: Apr. 24, 1993]

No. 384995

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO AND NADER OSTOVAR,

Plaintiffs,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D.A. BRIDGES, and ROB COCHRAN,

Defendants.

JUDGMENT OF PERMANENT INJUNCTION
Trial Date: Sept. 27-29, 1994

This matter was tried to the Court on September 27, 28, and 29, 1994. The parties submitted written closing argument. For the reasons explained in the accompanying Statement of Decision, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgement be entered in favor of the plaintiffs, Planned Parenthood Association of San Mateo County, Planned Parenthood Alameda/San Francisco, and Nader Ostovar, and against defen-

dants Operation Rescue of California and Robert Lynn Cochran, as follows:

1. Defendants and their agents, employees, representatives, and any persons in active concert or participation with them, or either of them, and all persons with actual notice of this Judgment, shall:

(a) not threaten, strike, or make physical contact with Dr. Ostovar or his family members;

(b) not keep Dr. Ostovar or any of his family members under surveillance;

(c) not follow Dr. Ostovar or any of his family members;

(d) not telephone Dr. Ostovar or any of his family members;

(e) not block Dr. Ostovar's or his family members' movements at home, in public places or on public thoroughfares, or on any property belonging to, leased or rented by Planned Parenthood;

(f) not take any photographs or videotapes of Dr. Ostovar, any of his family members, or any person accompanying or assisting him as he arrives at or departs from his place of employment or his home;

(g) stay at least 30 feet away from Dr. Ostovar and his family members; and

(h) stay at least 250 feet away from Dr. Ostovar's residence in San Mateo, California.

2. Defendants and their agents, employees, representatives and all persons acting in concert or participation with them, or either of them, and all persons with actual notice of this Judgment, are restrained and enjoined from directly or indirectly:

(a) Entering or blocking or obstructing the free and direct passage of any other person into or out of Planned Parenthood's San Mateo Clinic, maintained and operated by plaintiff Planned Par-

enthood Association of San Mateo County at 2211 Palm Avenue, San Mateo, California;

(b) Demonstrating, picketing, distributing literature, or counseling on Planned Parenthood's private property located at 2205 and 2211 Palm Avenue, San Mateo (including the walkway at the front of the clinic building, the walkways and driveways on either side of the clinic building, and the parking area behind the clinic building), or within fifteen (15) feet of such private property;

(c) Entering or blocking or obstructing the ingress or egress of any vehicle to or from any parking area in front of or behind said Clinic;

(d) Obstructing or impeding the movement of any person between any vehicle and said Clinic, or of any person using the walkways leading to the front door of the clinic and along the south wall of the clinic building;

(e) Approaching any Planned Parenthood staff member, patient or companion once that person has made it unmistakably clear that he or she does not wish to be approached;

(f) Shouting, screaming, or otherwise producing loud noises which can be heard within said Clinic;

(g) Physically touching, threatening to physically touch, or shouting at any individual entering or leaving said Clinic.

IT IS SO ORDERED.

Dated: Apr. 21, 1995

/s/ Hon. Walter H. Harrington

Judge of the Superior Court

County of San Mateo

APPENDIX J

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR**

[Filed Nov. 20, 1996]

No. A070725

(San Mateo County Super.Ct.No. 384995)

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY et al.,
Plaintiffs and Respondents,

v.

OPERATION RESCUE OF CALIFORNIA et al.,
Defendants and Appellants.

ORDER MODIFYING OPINION AND DENYING REHEARING

BY THE COURT:

1. The request by appellant Operation Rescue of California for leave to file a late petition for rehearing is granted.

The opinion filed herein on October 28, 1996, is modified as follows:

1. On page 9, footnote 5, line 2, the words "striking down" are deleted and the word "upholding" is substituted.

2. On page 9, footnote 7, lines 2 and 3, the words "At the time the view was made" are deleted.

These modifications do not effect a change in the judgment.

The petitions for rehearing are denied.

Dated Nov. 20, 1996

/s/ Anderson, P.J.

APPENDIX K

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
No. S057732

First Appellate District, Division Four No. A070725

[Filed: Feb. 19, 1997]

No. 384995

PLANNED PARENTHOOD OF SAN MATEO COUNTY, ET AL.,
Respondents,

v.

OPERATION RESCUE OF CALIFORNIA, ET AL.,
Appellants.

Petitions for review DENIED.

Kennard, J., is of the opinion review should be granted.

/s/ George
Chief Justice

APPENDIX L

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

No. A070725

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO, and NADER OSTOVAR,

Plaintiffs and Respondents,

v.

OPERATION RESCUE OF CALIFORNIA, YOUTH FOR AMERICA, KEN REED, JEFF WHITE, KATHRYN SHORT, BRYAN HOWARD LONGWORTH, MICHELLE RENEE MUELLER, DAGMAR MERARI TORRES, MIKE CURTIS POWELL, KIMBERLEY ALVARENGA, MARY LEE SMEDLEY, DAVID DOUGLAS FULLER, DANIELLE ALFRED SILVA, JUDE FRANCIS VOS, PATRICK JOSEPH MCKENNA, MICHAEL CHRISTIAN ROSS, STANFORD ABNER WARNER, MARTIN MUNOZ, STEVE BUTLER, JOHN D.A. BRIDGES, AND ROB COCHRAN,

Defendants and Appellants.

OPENING BRIEF OF APPELLANT ROBERT LYNN COCHRAN

On appeal from a judgment of the Superior Court of the State of California, County of San Mateo Superior Court No. 384995

The Honorable Walter H. Harrington, Presiding

INTRODUCTION

Appellant Robert Lynn Cochran appeals from a judgment of the lower court imposing injunctive relief against Mr. Cochran and all persons with notice of the injunction. The injunction, which prohibits speech activity protected under the First Amendment, as well as unlawful conduct, is not supported by substantial evidence.

Respondents, two abortion facilities and an abortion doctor, obtained preliminary injunctive relief against Mr. Cochran, a pro-life counselor, by abusing a federal court order and misleading the court as to Mr. Cochran's involvement with Operation Rescue. At issue were two distinct forms of activity: 1) infrequent, sporadic blockades of an abortion clinic, sponsored by Operation Rescue, and 2) weekly picketing, leafletting, and counselling activity, carried on lawfully on the public sidewalk by Mr. Cochran and other individuals. Respondents deliberately equivocated in describing, e.g., "anti-abortion protestors" and "obstruction," to create the impression that all the activity at the clinic formed a single, concerted pattern of unlawful conduct.

Though this obfuscation was sufficient to obtain preliminary injunctive relief, at trial respondents could not maintain the fiction that Mr. Cochran had engaged in any unlawful conduct at respondents' facilities. Therefore, when ordered by the court to prepare its Statement of Decision, respondents took the opportunity to include all the "facts" they had failed to establish at trial.

At the same time, respondents also solidified the conversion of the case into an ersatz class action lawsuit against "anti-abortion protesters," with Mr. Cochran drafted as the class representative. By means of this legal leger-de-main, the evidence about "anti-abortion protesters" was cited to support injunctive relief against Mr. Cochran, and the injunction against Mr. Cochran could be applied to any and all anti-abortion protesters, past, present, and future.

The trial court's judgment is directly violative of Mr. Cochran's constitutional rights of free speech and due process, as well as the rights of countless other individuals against whom respondents have applied the injunction. An examination of the evidence, of the absence of evidence, and of the terms of the injunction itself reveals that the relief is not based on any record of unlawful or unprotected conduct. Rather, the injunction is legislation masquerading as litigation; it is the means of carrying out a judicially-created policy of discouraging and preventing personal contact between pro-life speakers and their intended audience, women considering abortion.

STATEMENT UNDER RULE 13

This is an appeal from an order granting permanent injunctive relief. This order is a judgment which finally disposes of all issues between the parties.

STANDARD OF REVIEW

Where a claim of constitutionally protected conduct is effectively made, a reviewing court has the duty "to search the records" in order to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by *insubstantial findings of fact screening reality.*" *N.A.A.C.P. v. Claiborne Hardware Co.* (1982) 458 U.S.886, 924 (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.* (1943) 312 U.S. 287, 293) (emphasis added).

The United States Supreme Court recently unanimously reaffirmed the duty of reviewing courts in approaching cases in which the First Amendment freedoms are at stake:

> Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, *without deference to the trial*

> *court.* . . . This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decided for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to make an independent examination of the whole record, so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression.

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (1995) 115 S.Ct. 2338, 2344 (emphasis added).

STATEMENT OF THE CASE

Respondents Planned Parenthood Association of San Mateo County [hereinafter "PPSM"], Planned Parenthood Alameda/San Francisco, and Nader Ostovar are abortion providers.[1] PPSM operates an abortion facility at 2211 Palm Avenue in San Mateo. CT:2.

Appellant Robert Cochran is an individual who, since 1989, has engaged in regular sidewalk counseling outside PPSM's San Mateo abortion facility. Reporter's Transcript of Sept. 28 and 29 [hereinafter RT 1]:111.[2]

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[1] The claims of Planned Parenthood Alameda/San Francisco and Nader Ostovar arose from protest activities occurring outside Ostovar's residence in early 1992. The only link between Mr. Cochran and this activity is Mr. Cochran's own testimony that on one occasion he participated in a prayer vigil outside respondent Ostovar's residence. There is no evidence that he ever engaged in any unlawful conduct with regard to respondent Ostovar or Planned Parenthood Alameda/San Francisco, and he has not contested that portion of the injunction pertaining to respondent Ostovar. RT 1:150.

[2] The Reporter's Transcript containing the testimony of Gabriela Gibson, Dian Harrison, and Robert Cochran, will be cited as "RT 1." The Reporter's Transcript containing, in two volumes, the testimony of Nader Os-

This lawsuit originated in March of 1992, in federal district court, when respondents brought an action alleging one federal claim, five state law claims, and one mixed claim. The factual allegations in the complaint dealt almost exclusively with 1) trespass and blockade activities which occurred on February 15, 1992, at the San Mateo clinic and at respondent Ostovar's residence, and 2) various other "harassing" activities directed at respondent Ostovar at or near his home, also in February, 1992. CT:17, 500.

As an apparent afterthought to these allegations, respondents also alleged that "anti-abortion protestors" had engaged in regular Saturday protests at the clinic for two years. The complaint alleged that four or five protesters

> would march up and down in front of the clinic, carrying graphic anti-abortion signs, chanting, and shouting. As patients drive or walk up to the clinic, the protestors approach them and try to force them to accept written flyers.

The complaint did not in any way identify these "regular Saturday" protestors, nor allege their relationship to the defendants.

Mr. Cochran was not named in this complaint. CT:17, 503-507. Rather, the defendants were Operation Rescue of California and seventeen individuals associated with Operation Rescue. These defendants were all allegedly involved in the unlawful blockade activities which took place on February 15, 1992, including 13 individuals who were arrested in the clinic on that day. CT:17, 503-507.

Respondents requested a temporary restraining order and preliminary injunction. Despite the fact that the complained-of activity attributed to the defendants consisted of illegal trespass and blocking, respondents sought and were granted a temporary restaining order which severely restricted picketing, leafletting and counseling on the public sidewalk in front of the clinic. This order was

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tovar, Therese Wilson, Anne Colby, and Howard Rosenthal, will be cited as "RT 2." These transcripts are separately paginated.

extended by stipulation during the pendency of the federal proceeding. CT:82-88.

Specifically, the temporary restraining order issued against the individual defendants prohibited them from "demonstrating, picketing, distributing literature, or counseling" on PPSM's private property in San Mateo, *or within fifteen feet of such property*. CT:87. Because PPSM's property is adjacent to the public sidewalk, the practical effect of this restriction is to ban demonstration activity on the entire public sidewalk in front of PPSM's facility. Thus, all speech activity was effectively confined to the sidewalk across the street from the facility.

Not only was this restriction on speech an illogical response to an invasion and blockade of the clinic, but respondents immediately began enforcing the injunction against every pro-life individual, including Mr. Cochran, whether or not such person was a defendant or acting in concert with the defendants. RT 1:116-117. Thus, an injunction supposedly obtained because of the unlawful blockade activity of one group of people became the vehicle for sweeping the sidewalk of all pro-life speech activity by any person.

Trial of the action in federal court was scheduled for October of 1992. In August of 1992, respondents finally amended their complaint to add Mr. Cochran as a defendant, though they had been enforcing the injunction against him for five months. CT:17.

On the eve of trial, the federal court continued the trial date indefinitely, to await the outcome of *Bray v. Alexandria Women's Health Clinic* (1993) 113 S.Ct. 753, which was then pending in the U.S. Supreme Court. After that decision was handed down in June of 1993, defendants filed a motion to dismiss for lack of federal jurisdiction. The motion was granted in August of 1993. CT:17-18.

In September of 1993, respondents brought virtually the identical action, minus the federal claims, in superior court. The complaint added some allegations concerning the history of the federal

suit, as well as allegations concerning a blockade of the San Mateo clinic in July of 1993. The complaint, which named Mr. Cochran as a defendant, claimed that he, along with the other defendants, "picketed and blockaded the San Mateo clinic" on February 15, 1992. CT:12.

Again, respondents sought a temporary restraining order and preliminary injunction. Presiding Judge Laurence Stevens issued a temporary restraining order which effectively split the sidewalk lengthwise, prohibiting the defendants from demonstrating only within three feet of clinic property. CT:93-97. At the hearing on the preliminary injunction, however, Hon. Walter Harrington reinstated the 15-foot zone. CT:529-532.

Throughout the ensuing litigation, and particularly at the settlement conference, Mr. Cochran offered to stipulate to all the terms of the preliminary injunction except the fifteen-foot zone. Respondents refused these offers. CT:635-638.

In September of 1994, a two-and-a-half day trial was held, with Judge Harrington presiding. On February 15, 1995, Judge Harrington issued a minute order granting respondents' requested relief in its entirety. CT:879. The minute order did not refer to *any* evidence presented at trial. Instead, stating that his earlier viewing of the site "continues to be determinative," Judge Harrington upheld the 15-foot zone solely on the basis that "[t]he vehicular through traffic does not have a clear view around the curve, and this fact, taken with the narrow sidewalk, creates an extreme traffic hazard with respect to any congregation of pedestrians on the Plaintiff's side of Palm Avenue."

The issue of the danger to through traffic posed by demonstrators on the sidewalk had never, in any form, been raised by any of the parties or by the court prior to the issuance of the minute order.

The minute order did not make any findings about any of the defendants' activities. It did not set forth the basis for upholding

any other item of injunctive relief other than the zone around the clinic and around respondent Ostovar's apartment building. It also did not say anything about the activities of respondent PPSM's employees, who formed the only "congregation of pedestrians on Plaintiff's side of Palm Avenue" since the preliminary injunctions had issued in April, 1992.

Appellants requested a statement of decision. CT:895-897. The court directed respondents to prepare a statement of decision and judgment. CT:902. The statement of decision submitted by respondents bears little resemblance to the court's minute order, and, for that matter, little resemblance to the trial. The statement of decision, and a judgment granting respondents all of their requested relief, including the 15-foot zone, was signed by Judge Harrington and filed on April 24, 1995. CT:1000-1026.

STATEMENT OF FACTS

A. Pre-injunction activity

Mr. Cochran first became involved in pro-life work in 1988, in response to the message of a speaker at his church. RT 1:107-8. In the spring of 1989 he decided that he had a responsibility to do pro-life work in his own neighborhood. For that reason, he decided to go every Saturday to the Planned Parenthood clinic a few blocks from where he lived in San Mateo. RT 1:108. Once there, he began sidewalk counseling, which he described as offering literature and information on abortion and alternatives to abortion to women going into the clinic. In sidewalk counseling, he attempts to open a door with the women for communication, and to persuade them to consider other options. RT 1:109.

The first several Saturdays he went to the clinic, there were approximately five or six people already there, from whom he obtained some sidewalk counseling literature. RT 1:109-10. After that, Mr. Cochran was the only pro-life person there for about a year; then more people started coming, until the numbers averaged

about four to eight. RT 1:113. Mr. Cochran and the others would stand on the public sidewalk along the front of the clinic, from just north of the north driveway to south of the south driveway. RT 1:113. Some of the pro-lifers carried signs, while one or two of them also engaged in sidewalk counseling. Their practice was to have only counselor at a time approach a potential client, while the other would remain a few steps back praying. RT 1:113-5

In addition to sidewalk counseling on Saturdays, Mr. Cochran has been involved in an annual prayer event called "Turn the Hearts." RT 1:137-8. Mr. Cochran testified that this event, sponsored by California Coalition for Life, consists of people gathering to pray outside abortion clinics every hour they are open, for one day or one week. In the first year, 1991, Mr. Cochran led a group of about fifteen people in prayer on the public sidewalk in front of Planned Parenthood. During this event, there was no obstruction of the sidewalk, and the praying individuals were positioned in such a way as to leave room for passage. RT 1:139-40.

On February 15, 1992, Mr. Cochran was present, as was his custom, on the public sidewalk in front of the clinic, when a number of other people arrived and entered the clinic. RT 1:115. He had no prior notice of the clinic blockade which took place that day, nor did he participate. He simply remained on the public sidewalk in front of the clinic. RT 1:116.

Of the six witnesses called by respondents, only two, Anne Colby and Gabriela Gibson, testified to ever having even seen Mr. Cochran in front of the clinic.

Anne Colby

Ms. Colby, formerly the Executive Director of PPSM, testified that she was not usually at the clinic on Saturdays, and that therefore she did not have a regular opportunity to observe Mr. Cochran's behavior at the clinic RT 2:171. She testified that she had never seen him block anyone's access to the clinic; rather, she

had only seen him "walk with authority" in front of patients to talk to them. RT 2:170.

Although Ms. Colby originally testified that the "Turn the Hearts" event was sponsored by Operation Rescue, RT 2:143, on cross-examination she stated that this was simply a conclusion she had reached based on the fact that she had received information about "Turn the Hearts" at the same time as she received some information from Operation Rescue. RT 2:159. However, respondents offered an exhibit which showed that California Coalition for Life was the organizer of the event. RT 2:158; Plaintiffs' Exh. 15. Ms. Colby testified that the "Turn the Hearts" event did not block access to the clinic. RT 2:157, 168-9.

As to picket activity in general, Ms. Colby testified that she never saw any protesters block the entrance to the clinic. She had seen them run to cars to talk to people. RT 2:169.

Gabriela Gibson

Gabriela Gibson is employed by PPSM as reproductive health specialist and clinic defense captain. RT 1:2. When asked what she observed at the "anti-choice protests" in 1990, she replied:

> "I observed the protestors on the sidewalk in front of the clinic attempting to approach patients as they arrived. They held signs and pamphlets which they attempted to get to patients. There was a handful."

RT 1:6. Ms Gibson went on to approximate the "handful" as numbering three to five. She was then asked to describe the "anti-abortion protests" in 1991. She said that the numbers increased to about five to ten, and that they would stay about three hours. RT 1:7. In describing their activities, Ms. Gibson testified:

> "They held signs, large signs, with anti-abortion slogans or pictures of fetuses. They returned [sic] patients as they were approaching if by foot. They would rush up to them. If in a car, they wereû would also rush up to the driver. They

> would yell to the patients attempting to stop patients from entering the clinic, yell things regarding abortion, equating abortion with murder."

RT 1:8. Ms. Gibson then identified Mr. Cochran as one of the "protestors". Id.

These two statements of Ms. Gibson, and Ms. Colby's statement about Mr. Cochran "walking with authority", constitute the entirety of the eyewitness evidence presented by respondents concerning Mr. Cochran's weekly activities before the injunction. There was no testimony that Mr. Cochran blocked access to the clinic, trespassed, assaulted or threatened anyone, made noise audible inside the clinic, or interfered with vehicular[3] or pedestrian traffic.

Ms. Gibson testified extensively about the Operation Rescue blockade on February 15, 1992. RT 1:26-40. Concerning Mr. Cochran's involvement, she stated that he had blocked ingress and egress by "being a part of the crowd that was near the front door on the sidewalk." On further questioning, she estimated that he was about fifteen feet from the front door when she saw him.[4] RT 1:75.

B. Post-injunction activity

In March, 1992, Mr. Cochran was served with a temporary restraining order by Planned Parenthood employees. RT 1:116. He was not named on the injunction and his activities at the clinic were not done in cooperation with any of the named defendants, including Operation Rescue. Therefore, he believed that the in-

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[3] Ms. Gibson did not specify whether the drivers who were approached were on the street, turning into the driveway, or parked. In the absence of any testimony on that point, it would be improper to conclude that Mr. Cochran had impeded traffic.

[4] The photographs taken on February 15, submitted as Plaintiffs' Exhibit 21, show no crowd of people on the public sidewalk blocking ingress and egress. Rather the photos show the people on the sidewalk to be fairly well-spaced and often moving. Ms. Gibson testified that these photographs accurately represent what she observed on that day. RT 1:33.

junction did not apply to him. RT 1:116-7. However, very shortly after he was first given the injunction, he became convinced by Planned Parenthood employees that he would be arrested if he did not comply with it; thereafter, he complied with its terms, even though he was not named in the lawsuit underlying the injunction until several months later. RT 1:117.

While he always tried to abide by the terms of the injunction, Mr. Cochran recounted two occasions when he inadvertently walked a few feet into the speech-free zone. As soon as he realized his mistake, he left the zone. RT 1:118-9. He has never blocked ingress or egress to the clinic whether during the weekly sidewalk counseling or during the Operation Rescue blockades which occurred while he happened to be present at the clinic. RT 1:119-20, 142.

In the summer of 1993, the federal restraining order was dissolved, and a new state court restraining order was imposed allowing him to be on half the sidewalk. When Mr. Cochran arrived at the clinic, there were, as well as the usual Planned Parenthood volunteers, a number of persons whose clothing identified them as being from BACORR, the Bay Area Coalition for Our Reproductive Rights. When Mr. Cochran attempted to step onto or walk down the sidewalk, one of these BACORR demonstrators pushed him off the sidewalk using her arm and shoulder. This blocking happened several times, and once was recorded in a photograph. RT 1:120-1; Defendants' Exhibit E. He also observed the BACORR demonstrators surrounding patients, making it impossible to give them any information. RT 1:124. Mr. Cochran also witnessed a BACORR leader talking to PPSM's employee Gabriela Gibson, as well as seeing the BACORR demonstrators go in and come out of the clinic. RT 1:123.

Mr. Cochran testified that, with the 15-foot zone in place, he usually stands across the street from the north driveway. RT 1:125. PPSM agents stand with signs and direct people to park in the back of the clinic, so that not many people park along the street. RT 1:125-6. Therefore, Mr. Cochran sometimes either tries to

signal to cars approaching the clinic to stop for information, or he calls out to the people who have parked in back of the clinic and are walking up the driveway to the door. When calling out to people, he sometimes walks into the street, but outside the zone, to make his offer of information. RT 1:126.

Mr. Cochran described the efforts of the Planned Parenthood volunteers to impede his efforts to approach patients. When a car parks on the street, and he approaches the car to speak to the occupants, the volunteers will either go to the other side of the car or come to his side and get in front of him, to interrupt the conversation. RT 1:145-6. If the volunteers reach the car first, they tell the occupants that Mr. Cochran is just a protester, that they don't have to listen to him, and that if they (the clients) don't want to talk to him, they can tell him that and he will have to be quiet. RT 1:146.

On the occasions when Mr. Cochran is approaching someone on the sidewalk, the volunteers place themselves between Mr. Cochran and the client and will continue to move forward or backward to stay in the way and prevent Mr. Cochran from offering information. RT 1:146. Occasionally, in addition to speaking to the clients, the volunteers make noises such as coughing. RT 1:127.

In spite of PPSM's volunteers' best efforts, Mr. Cochran has succeeded in giving his information to some women, and some of these women have changed their minds and decided not have abortions. Mr. Cochran testified that his church has begun a ministry to keep in touch with these women and their families, to check on their well-being and to provide support to them, material or otherwise. Before this ministry was formed, Mr. Cochran himself undertook this effort. RT 1:130-1.

Ms. Gibson was the only one of respondents' witnesses to testify to Mr. Cochran's activities after the temporary restraining order and preliminary injunction issued. Ms. Gibson testified that, after the federal restraining orders were issued, it was her understanding that any person who had been served with the orders was

subject to it, regardless of whether they had any connection with the litigation.[5] RT 1:74. Ms. Gibson testified that she would call the police whenever she saw a protestor in the zone who had been previously served. RT 1:73. On the basis of this belief in the universal application of the temporary restraining order, she testified to seeing a number of persons, including Mr. Cochran, "violating" the injunction on March 21, 1992 by being within fifteen feet of the clinic property. RT 1:44-45. There was no indication that Mr. Cochran or anyone else present on that day impeded access, trespassed, made excessive noise, engaged in unlawful conduct, or did anything other than walk on the sidewalk.

As to Mr. Cochran's post-injunction activity, Ms. Gibson testified to seeing Mr. Cochran "obstructing" cars on the street, by waving his arms and attempting to flag them down. RT 1:60. She stated that he comes so close that the cars frequently slow down, because, "*in my judgment*, it appear they're stopping because he's so close as to be in danger." RT 1:79 (emphasis added). In response to further questioning, she stated that sometimes the cars keep going, sometimes they stop, and "most times they are confused as to who he is and why he's trying to flag down the cars." Id. She did *not* testify that any cars were hindered from proceeding. Ms. Gibson further testified that she also speaks to the drivers in these situations, to tell them park in the back if they are going to Planned Parenthood. Id.

Ms. Gibson testified that Mr. Cochran has come into the zone on four or five occasions, though she did not give any details, such as when this occurred, how long he was in the zone, how far he came into the zone, was it apparently deliberate or inadvertent, or what he did while in the zone. RT 1:59-60. She testified that on several occasions, Mr. Cochran has continued to approach persons who have told him they do not wish to speak to him. RT 1:61. There was no indication from Ms. Gibson's testimony as

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[5] Ms. Colby, too, testified that, as far as she knew, all protesters were told, upon being given notice of the injunction, that they had to leave the public sidewalk. RT 2:162.

to whether she was referring to simply speaking to a patient, or physically approaching patients.

Ms. Gibson testified that Mr. Cochran will run half a block down the street to meet persons walking toward the clinic, and that he will follow them to the clinic, pleading with them concerning abortion. RT 1:60.

ARGUMENT

I. THE TRIAL COURT'S STATEMENT OF DECISION IS UNSUPPORTED BY THE RECORD AT TRIAL.

The Statement of Decision issued by the trial court contains numerous findings of fact which are unsupported by the trial record. CT:1000.

Contrary to ¶3 of the Statement of Decision (CT:1003), respondents introduced no evidence or testimony connecting Mr. Cochran with the July, 1990 rescue. The only evidence regarding Mr. Cochran and the July 17, 1993 rescue was testimony of Gabriela Gibson that Mr. Cochran "was there" on that date. She did not see him obstructing access to the clinic. RT 1:58. She only saw him standing across the street from the clinic. RT 1:76. She also testified that he had been at the clinic "almost every week for the last four years." RT 1:58.

Contrary to ¶4 (CT:1003), there was no evidence that Operation Rescue had sponsored, or that its members have participated in, regular Saturday morning protests at the San Mateo clinic.

Contrary to ¶7(a) (CT:1003), there was no evidence that Mr. Cochran ever entered onto Planned Parenthood's property during the rescues. The closest thing to evidence that Mr. Cochran ever obstructed access to the clinic during a rescue was Ms. Gibson's testimony that on February 15, 1992, Mr. Cochran blocked ingress and egress to the clinic "by being part of the crowd that was near

the front door on the sidewalk." She estimated that he was about fifteen feet from the door when she saw him. RT 1:75.

Contrary to ¶7(b) (CT:1003), there was no evidence that Mr. Cochran ever obstructed access to the clinic during his weekly sidewalk speech activity. The only evidence respondents presented as to Mr. Cochran's conduct on the sidewalk before the preliminary injunction issued was the testimony of Gabriela Gibson and Anne Colby cited above. RT 1:6-8; RT 2:170. Also, as noted above, there was no evidence that Operation Rescue conducted any regular sidewalk protest activities at the clinic.

Paragraph 9(a) is a good example of ideology supplanting evidence. As noted above, the only evidence respondents presented as to Mr. Cochran's conduct on the sidewalk before the preliminary injunction issued was the testimony of Gabriela Gibson and Anne Colby. These witnesses, in spite of their unquestionable bias against Mr. Cochran, described him as "walking with authority" (RT 2:170), "attempting to get" literature to patients, and "rushing" (not running) to patients. RT 1:6. They did not describe him "repeatedly hounding," "haranguing." or "following" patients, or "thrusting literature at them even after they have indicated they do not want it." CT:1005.

Contrary to ¶9(b), there was no evidence that Operation Rescue's members ever engaged in "hounding," "following," "thrusting," etc. CT:1005. As noted above, there was no evidence that Operation Rescue's members ever engaged in any regular protest activity at the clinic.

Regarding ¶9(c) (CT:1005), Ms. Colby testified that she heard the protesters, but she also testified that she was usually not at the clinic on Saturdays, so she was probably referring to hearing the Friday protesters. Cf. RT 2:135, 145, 171, 172. This conclusion is supported by the testimony of two other witnesses.

Dr. Howard Rosenthal, PPSM's medical director, testified that, while inside the clinic, he could hear the protesters on the two days

when the clinic had been blockaded. RT 2:184. When specifically asked whether he had heard them on any other days, he cited only one other day, in 1989, when additional protesters from the Daly City clinic were present. RT 2:195.

Even more significantly, Ms. Gibson, who was at the clinic most Saturdays for the express purpose of monitoring the activities of the protesters (RT 1:4), testified that she could not recall hearing the protesters inside the clinic before the preliminary injunction issued. RT 1:10.

Thus, not only does the evidence not support the finding in ¶9(c), but it seems rather to establish that Mr. Cochran was *not* heard inside the clinic.

Contrary to ¶9(d) (CT:1005), Mr. Cochran testified that he has always tried to obey the injunction. He recounted two occasions when he inadvertently walked a few feet into the speech free zone. As soon as he realized his mistake, he left the zone. RT 1:119.

Contrary to ¶10(a) (CT:1006), Mr. Cochran testified that he went to the clinic on Saturdays, a day when abortions are performed, because he felt he had a responsibility to do pro-life work in his neighborhood. For Mr. Cochran, that work took the form of sidewalk counseling, which he described as "trying to reach women, especially, who are headed to perhaps for an abortion at the clinic to try to give them literature and to develop a communication, an open door with the women for communication." RT 1:109.

Only by employing the respondents' ideology can this be construed as an "admission" that Mr. Cochran went to the clinic with the intent of inflicting severe emotional distress, and that he was targeting patients who would be particularly vulnerable to a "campaign of harassment and intimidation."

Contrary to ¶10(b), there was no evidence whatsoever concerning Mr. Cochran's or any defendant's knowledge of "increasing violence at abortion clinics nationwide," much less that they

were aware that respondents' staff would be especially vulnerable to "harassment" because of any increased violence.

Contrary to ¶11(b) (CT:1007), in describing the purpose of his activities at the clinic, Mr. Cochran testified,

> I understand that if a woman is going in for an abortion, she's likely to be very upset and I try to approach her in a way that she will talk to me; that she will receive the information and perhaps, she would receive some hope and alternatives to having a child aborted and that she would change her mind about an abortion that day or in the future."

RT 1:109. Again, only by adopting respondents' ideology could this statement be considered an "admission" of tortious interference with an economic relationship.

As for ¶11(c) (CT:1008), there is nothing tortious *per se* in Mr. Cochran having persuaded some women to reconsider their decision to have an abortion, even if it caused respondents some inconvenience and financial loss. Similarly, such an intent and such an effect does not remove Mr. Cochran's speech activity from the protection of the First Amendment. *See, e.g., Thornhill v. Alabama* (1940) 310 U.S. 88, 99 (picket was constitutionally protected even though purpose "was concededly to . . . induce such customers not to patronize the employer"); *N.A.A.C.P. v. Claiborne Hardware* (1982) 458 U.S. 886, 909-10 ("Petitioners admittedly sought to persuade others to join the [economic] boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because if may embarrass others or coerce them into action"); *Thomas v. Collins* (1945) 323 U.S. 516, 537 (" 'free trade in ideas' means free trade in the opportunity to persuade to actions, not merely to describe facts"). *See also, A.F. Arnold & Co. v. Pacific Professional Ins., Inc.* (1972) 27 Cal.App.3d 710, 715 ("No case has been found in which intended but purely incidental interference resulting from the pursuit of the defendant's own ends by proper means has been held to be actionable").

In ¶15 (CT:1010), the defendants' tortious conduct warranting injunctive relief is apparently summed up û and there is no evidence that Mr. Cochran committed any of the enumerated tortious acts.

Contrary to ¶17 (CT:1010), there was absolutely no evidence at trial that the "weekly protests," much less Mr. Cochran in particular, interfered with the free flow of traffic on the sidewalk, obstructed the passage of vehicles into the driveway, or created a potentially dangerous distraction for drivers. Ironically, the only time any mention was made of cars on the street was when the respondents complained of Mr. Cochran's conduct while he was across the street *in compliance with the preliminary injunction*. RT 1:59-60. Meanwhile, PPSM's agents have maintained a constant presence on the sidewalk in front of the clinic, exactly where this supposed "extreme traffic hazard" would be created. RT 1:145-6.

Finally, although Mr. Cochran has stipulated to that part of the injunction pertaining to respondent Ostovar, it should be noted that contrary to the Statement of Decision, Mr. Cochran did not commit any tortious acts, much less "numerous" tortious acts, at plaintiff Ostovar's place of residence. CT:1014. The only evidence pertaining to Mr. Cochran on this issue was Mr. Cochran's own testimony that on one occasion, he stood on the public sidewalk in front of respondents Ostovar's residence with about a half a dozen other people, holding a sign, praying, and talking to other pro-lifers. RT 1:143-4. He did not see Dr. Ostovar or any of his family members. There was no evidence that Mr. Cochran ever trespassed on or obstructed access to Dr. Ostovar's private property, nor that he ever harassed and intimidated Dr. Ostovar. RT 1:145.

II. THE TRIAL COURT ERRED IN ISSUING AN INJUNCTION AGAINST MR. COCHRAN IN THE ABSENCE OF ANY FACTUAL BASIS FOR SUCH RELIEF.

Having reviewed the evidence against Mr. Cochran, it is indisputable that there is no factual basis for issuing any injunction

against him. An injunction will issue "only if there is a showing that the defendant has violated, or imminently will violate some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'" *Madsen v. Women's Health Center* (1994) 114 S.Ct. 2516, 2524, n. 3, citing *U.S. v. W.T. Grant Co.* (1953) 345 U.S. 629, 633.

Respondents utterly failed to establish that Mr. Cochran has violated any law. There is no evidence that he ever trespassed on respondents' property. There is no evidence that he blocked access to respondents' clinic.[6] There is no evidence that he ever assaulted anyone, threatened anyone, made noise audible within the clinic, or committed any other act which could be construed as disturbing the peace. On the contrary, Mr. Cochran's conduct has been consistently peaceful and legal for the past five years, both before and after the preliminary injunctions issued.

For this reason, there is no basis for the court to issue a permanent injunction prohibiting Mr. Cochran from engaging in the unlawful activities set forth in their prayer for relief.

III. THE PERMANENT INJUNCTION IS UNCONSTITUTIONALLY OVERBROAD

The heart of respondents' requested relief was not in the unlawful activities it sought to enjoin. Rather, the motivating force behind this lawsuit can be found in the provisions of the injunction which prohibit constitutionally protected activity, particularly

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[6] Even assuming arguendo that Mr. Cochran had blocked access by standing with a group of people on the sidewalk on February 15, 1992, this would make a grand total of one incident of blocking access, in five years of weekly sidewalk counseling. A single such incident is clearly insufficient to warrant injunctive relief. *Gleaves v. Waters* (1985) 175 Cal.App.3d 413, 417 ("past exposure to illegal conduct does not itself establish a right to injunctive relief; the prospect of future injury is gauged by the *continuing* nature of the past illegal conduct or the *likelihood* it will be repeated") (emphasis added); *Paradise Hills Assoc. v. Procel* (1991) 235 Cal.App.3d 1528, 1546 (for an injunction to issue based on past acts, there must be "evidence that they will probably recur")(quoting *Rosicrucian Fellow v. Rosicrucian Etc. Church* (1952) 39 Cal.2d 121.)

in the paragraph which prohibits the defendants from engaging in speech activity within fifteen feet of PPSM's property or the driveways adjacent to such property.

In *Madsen v. Women's Health Center*, *supra*, the Supreme Court established the standard for the exceptional creation of limited "speech-free" zones. While noting a number of significant governmental interests at stake, the Court grounded its decision firmly on the issue of preserving access to the clinic. The Court upheld the zone established by the trial court, not on some vague rationale of protecting patients from "harassment" but because 1) it was undisputed that "the presence of protesters standing, marching and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic" and 2) an earlier, less restrictive order designed to protect access had been repeatedly violated.[7]

Neither of these conditions is present in the instant case.

A. *There is no evidence that Mr. Cochran has obstructed ingress and egress or interfered with the free flow of traffic.*

There was no evidence that Mr. Cochran blocked ingress to or egress from the clinic. As noted in the Statement of Facts, *supra*, Ms. Gibson's testimony regarding the regular activities of Mr. Cochran when he was in front of the clinic contains not a word about blocking ingress and egress. RT 1:6-8. Similarly, there is no evidence that Mr. Cochran ever impeded traffic on the sidewalk or in the driveways when he was in front of the clinic.

The only evidence about possible interference with vehicular traffic is Ms. Gibson's testimony referring to Mr. Cochran's attempts to contact people in cars from across the street, *in compliance with the terms of the preliminary injunction*. RT 1:59-60,

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[7] *See also*, *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 Cal.4th 1009, 1023 (upholding speech-free zone, where the trial court found that protesters "had significantly blocked driveways surrounded patients' cars, and stalked and obstructed patients walking to and from their cars and public transportation" and "[a] less restrictive alternative had been tried and found wanting."

78-79. The preliminary injunction placed Mr. Cochran across the street from the clinic, forcing him to walk into the street to distribute literature, or clients to walk across the street to him, or cars to stop to receive literature. Obviously, this presents a far greater hazard to the free flow of traffic than if Mr. Cochran were on the sidewalk in front of the clinic, where there is no evidence he ever impeded traffic on the street or sidewalk.

If the speech-free zone were not in place, there would be no need for Mr. Cochran to try to reach people in cars before they arrived at the clinic. Respondents are in no position to object to Mr. Cochran's activities in this regard, when they themselves have created the situation where the only way for him to contact people is to reach them before they enter the zone or after they leave it. Respondents preferred solution, of course, is that Mr. Cochran have no contact with anyone approaching the clinic.

Without any evidence of obstruction, much less persistent obstruction, the imposition of a "speech-free" zone[8] is an unconstitutional infringement of Mr. Cochran's First Amendment rights. The Court in ***Madsen*** found that the creation of the zone was justified by the court's finding, accepted ***arguendo*** by the defendants, that the large numbers of picketers interfered with ingress and egress, as well as caused a back-up of vehicular traffic on the street fronting the clinic. 114 S.Ct at 2528. The Court specifically stated that "the accepted purpose of the 36-foot buffer zone is to protect access to the clinic and facilitate the orderly flow of traffic on Dixie Way." *Id.*

Conversely, the Court reversed the imposition of a zone where there was no evidence that protestors obstructed access to the clinic or interfered with traffic. In the absence of such evidence, the Court held that these portions of the zone burdened more

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[8] The zone is not really a "speech-free" zone, only a pro-life speech-free zone. This is clearly evidenced by the fact that PPSM's own employees and agents regularly occupy the zone for the purpose of speaking to patients. RT 1:100-101; RT 2:152, 163-5; Plaintiffs' Exh. 17.

speech than necessary to protect access to the clinic. 114 S.Ct. at 2528.

Clearly, in the instant case, where there is no evidence that, in the absence of the injunction, Mr. Cochran obstructed access or interfered with vehicular or pedestrian traffic, the zone imposed by the trial court burdens, and has burdened, more speech than necessary protect access to the clinic.

B. *Mr. Cochran did not violate a prior court order.*

In upholding the zone imposed by the lower court, the Supreme Court in ***Madsen*** relied several times on the fact that the trial court had originally issued a narrower order, one which simply prohibited obstruction of access. The petitioners had repeatedly violated this order. The Court cited this factor in particular in explaining why the order was not content-based: "Here the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order." 114 S.Ct. at 2523-4. In holding that the zone burdened no more speech than necessary to accomplish the asserted governmental interests, the Court stated, "The state court was convinced that allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access." 114 S.Ct. at 2527.

In the instant case, a speech-free zone was imposed by a federal court order, then slightly shrunk for a brief time by a state court temporary restraining order, and then expanded to its original contours by the preliminary injunction in this action. There is no evidence that a lesser restriction than a zone would be inadequate, because a lesser restriction was never tried.

The only significant evidence regarding the interim period between the expiration of the federal court injunction and the state court orders was from Mr. Cochran. On Saturdays during this period, in addition to PPSM escorts and Ms. Gibson, several members of BACORR (Bay Area Coalition for Our Reproduc-

tive Rights) were present on the sidewalk, in the driveway, and on PPSM's property, carrying signs. RT 1:121-124, 135-137. By blocking, pushing, and forming a human wall, they prevented him from even getting on the public sidewalk. RT 1:121, 137. Far from establishing that the zone imposed on Mr. Cochran was necessary to protect access, this evidence reveals the content-based nature of the zone. Respondents are more than willing to have large numbers of persons on the public sidewalk and in the driveways, as long as those persons are proclaiming the correct message.

In sum, respondents utterly failed to show that the zone burdened no more speech than necessary to protect access. First, there was no evidence that access was being impeded by Mr. Cochran or the other weekly picketers and counselors. Second, the only instance of a slightly lesser restriction being attempted was defeated by the respondents themselves permitting, if not inviting, cadres of pro-abortion demonstrators.[9]

The imposition of a zone under these circumstances amounts to a content-based restriction on speech. Unlike *Madsen*, the trial court cannot say that the zone was only imposed on Mr. Cochran because only he engaged in unlawful acts, violated a court order, and posed a threat to access. Rather, the zone was and continues to be imposed in the absence of any such showing, and in the face of evidence of large demonstrations by the respondents' allies.

C. *The lower court erred in holding that the zone was justified to protect the "health and safety" of patients.*

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[9] Though PPSM's employees Gabriela Gibson and Dian Harrison denied any responsibility for the presence or actions of these pro-abortion demonstrators (RT 1:83; RT 2:102), Mr. Cochran testified that he witnessed Ms. Gibson speaking to one of their leaders, as well as seeing others go in and out of the clinic. RT 1:123. What is undisputed is that 1) these demonstrators appeared on the very day or days when the clinic was open and the 15-foot zone was not in effect, 2) PPSM did not attempt to enforce the TRO against them, as it had enforced the earlier order against "all persons [read pro-life persons] with notice."

The Statement of Decision states that "The evidence showed that the noise level created by the protesters and the acrimonious face-to-face confrontations have seriously distressed PPSM's patients and staff, . . ." CT:1011. As noted above, there is no evidence that Mr. Cochran ever created any noise audible inside clinic. Further, the description of Mr. Cochran's encounters with patients as "acrimonious" is overstated, to say the least. Given the ideological stance of respondents' employees, it is not surprising that they, personally, would find Mr. Cochran's message unwelcome. But it is inappropriate for them to project their feelings onto every client and companion who comes to their facility. As Mr. Cochran testified, some women have been willing to receive the information, and have, in fact, changed their mind about having abortions. However, only those forceful enough to get away from PPSM's "escorts" are able to receive that information and talk to Mr. Cochran. The others are hemmed in by the escorts and hear only the escorts' admonitions to drive or walk right in and pay no attention to the anti-choice protestors, that they don't have to listen, that they can tell him that they don't want to talk to him and he will have to be quiet. RT 1:146-7.

The Statement of Decision further holds that the conduct of the defendants has caused patients to suffer emotional distress. CT:1007. However the evidence on this issue, from respondents' own witnesses, showed that it is the *message* conveyed by pro-life protesters which causes these patients to become upset. PPSM employee Anne Colby testified that it was the mere presence of protesters on the sidewalk in front of the clinic, nothing else, which patients found intimidating. RT 2:160. Ms. Colby also testified that some patients are disturbed by some of the literature distributed by the protesters. RT 2:166. PPSM employee Dian Harrison testified that, even with the injunction in place, patients are intimidated by "the mere sight of protestors" across the street from the clinic. RT 1:100-101.

PPSM medical director Howard Rosenthal testified that "most of the [patients] who expressed anger and resentment about this,

it was because they were approached by people trying to talk to them when they didn't particularly want to talk toû didn't feel they had to talk to." RT 2:192-3. Some of these patients also referred to the fact "that people tried to hand them literature that they really didn't want and didn't accept." RT 2:193-4.

This testimony shows that, rather than conduct, it is the content of the the message which is at issue. It is the content of the message which respondents wish to prevent their patients from being exposed to. It is the content of the message which respondents wish to keep at a distance, in the interests of protecting the "health and safety" of its patients.

The First Amendment, however, does not tolerate restrictions on speech predicated on subjective audience reactions. *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *U.S. v. Eichman* (1990) 496 U.S. 310, 319 (quoting *Texas v. Johnson* (1989) 491 U.S. 397, 414. "[I]f absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston v. Hill* (1987) 483 U.S. 451, 462 n. 11 (editing marks and citation omitted).

In the very context of "protecting" women seeking abortion, the Supreme Court in *Madsen*, *supra*, considered a restriction on speech that was designed to protect patients and staff from being "stalked" or "shadowed" as they approached the clinic. Specifically, the challenged provision prohibited, within 300 feet of the clinic, physically approaching any person seeking services "unless such person indicates a desire to communicate." 114 S.Ct. at 2529.

The Court struck down the provision, holding that it burdened more speech than necessary to prevent intimidation and ensure access to the clinic. The Court stated "Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistin-

guishable from a threat of physical harm, [citation omitted], this provision cannot stand." In fact, the Court stated, "the consent provision alone invalidates this provision." 114 S.Ct. at 2529.

Though the geographical mechanics differ, the zone imposed on Mr. Cochran is equivalent to the 300-foot no-approach zone struck down by the Supreme Court. Both restrictions were intended to "prevent intimidation" of patients. Both set out to achieve this goal by preventing demonstrators and counselors from approaching patients. As the trial court put it, the zone prevents "face-to-face confrontation" between the defendants and PPSM's patients and staff. CT:1012.

Obviously what the trial court has described is identical in function and justification to the no-approach zone which the Court ruled unconstitutional in *Madsen*. The zone here, however, goes even farther than the one struck down by the Supreme Court, in that it prohibits approaches even if invited by the patient. Rather, the patient must cross the street and go to Mr. Cochran to speak with him or receive information.

In *Planned Parenthood Shasta-Diablo v. Williams*, *supra*, the California Supreme Court distinguished the 300-foot no-approach zone struck down in *Madsen* as overly burdensome, from the speech-free zone at issue in *Williams*, by stating that "the evidence here amply supported the conclusion that a buffer zone . . . was necessary to 'prevent intimidation and to ensure access to the clinic.'" 10 Cal.4th at 1025. As noted *supra*, n. 7, this included evidence that protesters "had significantly blocked driveways surrounded patients' cars, and stalked and obstructed patients walking to and from their cars and public transportation." *Id.* at 1023.

Moreover, "[a] less restrictive alternative had been tried and found wanting." *Id.* at 1024.[10]

As the record in the instant case contains no such evidence against Mr. Cochran, clearly the zone, which is explicitly intended to prevent one-on-one contact ("face-to-face confrontation" CT:1012), burdens significantly more speech than necessary to prevent intimidation and ensure access.

D. *The prohibition on approaching persons who have asked not to be approached is unnecessarily burdensome.*

As noted above, the Court in *Madsen* struck down a provision of the lower court injunction which prohibited, within 300 feet of the clinic, physically approaching any person seeking services "unless such person indicates a desire to communicate." In striking down the provision the Court stated "as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." 114. S.Ct. at 2529 (citing *Boos v. Barry* (1988) 485 U.S. 312, 322).

In light of this statement, the injunctive restriction on approaching any Planned Parenthood employee, patient or companion "once that person has made it unmistakably clear that he or she does not wish to be approached" is constitutionally infirm. Other courts have struck down similar restrictions, both within and without the context of anti-abortion picketing. *See, e.g., United Food and Commercial Workers Int'l Union v. IBP, Inc.* (8th Cir. 1988) 857 F.2d 422, 425, n.4, 435 (overturning ban on "persisting in talking to or communicating in any manner with" a person or persons

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[10] *See also, Feminist Women's Health Center v. Blythe* (1995) 32 Cal. App. 4th 1641, 1664 (injunction creating speech-free zone along sidewalk, leaving parallel three-foot strip for defendants' use, was justified where there was "substantial evidence" that defendants "interfered with the sidewalk access to the clinic by means of physical obstruction as well as by the use of physical intimidation and harassment which served to constructively block access").

"against his, her, or their will," in order to persuade that person or person to quit or refrain from seeking certain employment; "as written this clause plainly runs afoul of the First Amendment"); *Fargo Women's Health Org., Inc. v. Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 411 (striking down prohibition on "speaking to" and "distributing leaflets or brochures" to *unwilling* listeners or recipients; held that other provisions of the injunction, prohibiting physically abusing persons entering or leaving the clinic, offered sufficient protection to patients and staff); *but see Sabelko v. City of Phoenix* (9th Cir. 1995) 68 F.3d 1169 (upholding ordinance requiring demonstrators to withdraw eight feet upon being requested by person approached); *Pro-Choice Network of Western New York v. Schenck* (2d Cir. 1995) 67 F.3d 377 (upholding injunctive "cease and desist" provision).

As a practical matter, there is no evidence that Mr. Cochran ever directed insulting, much less outrageous speech at anyone. And, as he testified, it is his usual practice to discontinue attempts to speak to any person who makes it clear that he or she does not wish to hear from him. RT 1:159. Unfortunately the activities of PPSM's escorts often make it difficult to determine when someone has indicated a desire not to speak to him. Between the noise created by their talking, the visual obstruction created by their bodies, and their coaching of the patients, it is difficult to assess when a clear request to desist has been made.

In short, this provision is not only unnecessarily burdensome, but it is extremely difficult to enforce under the conditions created by PPSM and its agents.

IV. THE TRIAL COURT ERRED IN USING ITS VIEW OF THE SITE FOR EVIDENCE OF ISSUES OUTSIDE THE PLEADINGS.

Paragraph 17 of the Statement of Decision incorporates Judge Harrington's minute order, with its conclusion, based on his viewing of the site before issuing the preliminary injunction, that "any

congregation of pedestrians" in front of the San Mateo clinic "creates an extreme traffic hazard." CT:1010.

The possibility of such a hazard was never raised as an issue by either party or by the trial court, for whom it was the "determinative" factor. It is a fundamental principle of due process that "a plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed at trial." *Lavely v. Nonemaker* (1931) 212 C.380, 385; *Weissensee v. Chronicle Publishing Co.* (1976) 59 C.A.3d 723, 729; *Pierce v. Pac. Gas. & Elec. Co.* (1986) 166 C.A.3d 68, 78; *People v. Toomey* (1985) 157 C.A.3d 1, 11. Although this rule may yield where the matter was in fact at issue at trial and actively litigated, such is clearly not the case here. The matter of whether persons congregating on the sidewalk posed a hazard to through traffic was never broached at all.

This use of the evidence gathered from the court's view, whether for purposes of the preliminary or permanent injunction, was erroneous: "The admission of evidence not within the pleadings is prejudicial error." *Mayer v. Beondo* (1948) 83 C.A.2d 665, 668; *People v. Toomey*, *supra*, 157 C.A.3d at 11.

V. THE TRIAL COURT ERRED IN ATTEMPTING TO ENJOIN NON-PARTIES NOT ACTING IN CONCERT WITH NAMED DEFENDANTS

The permanent injunction states that it is binding on "all persons with actual notice" of the injunction. CT:1024. In practice, of course, this means the order will bind all persons expressing a pro-life message in the vicinity of PPSM's San Mateo clinic. This provision is outside the trial court's jurisdiction, and violates the due process rights of individuals not party to this lawsuit:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgement *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . This rule is part of our deep-rooted historic

> tradition that everyone should have his day in court. A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Martin v. Wilks (1989) 490 U.S. 755, 761-2. The law is equally clear with regard to the binding force of injunctions on unrelated third parties:

> [A court] cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, the act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him. . . . *[I]t is not the act described which the decree may forbid, but only the act when the defendant does it.*"

Alemite Mfg. Corp. v. Staff (2d Cir. 1930) 42 F.2d 832, 832-33(emphasis added). *See, also, Chase National Back v. City of Norwalk* (1934) 291 U.S. 431 (order purporting to bind "all persons to whom notice of the order of injunction shall come" was clearly erroneous as it "assumed to make punishable as contempt the conduct of persons who act independently and whose rights have not yet been adjudged according to law"); *In re Berry* (1968) 68 Cal.2d 137, 155-56, n.14 (Court has "grave doubts as to the jurisdictional validity of an injunctive order directed to persons other than the parties defendant, their representatives, and persons in active concert or participation with them. See and compare Fed.R.Civ.P. 65(d).")

Even leaving precedents aside, it is clearly illogical to justify an injunction as necessary because of the defendants' past unlawful acts, and then apply the injunction to all persons with notice. Either the zone is remedial relief, in which case it applies only to the defendants found liable, or it is a content-based restriction on speech which respondents find disagreeable. Should there be any lingering doubts as to which of these was the true goal of this litigation, these doubts must be dispelled by respondents' insistence that the court make the order binding on all persons with notice. "All persons with notice" means simply all persons expressing a pro-life viewpoint in the vicinity of PPSM's clinic. As Mr. Cochran's experience under the temporary restraining order made clear, respondents have no interest in preventing demonstrations in front of the clinic by those espousing the "correct" view.

CONCLUSION

The trial court's Statement of Decision is completely unsupported by the record at trial. The evidence presented against Mr. Cochran does not justify any injunctive relief against him, much less a permanent injunction barring him from the public sidewalk and separating him from the audience with whom he wishes to communicate in a lawful, constitutionally protected fashion. Mr. Cochran respectfully requests this Court to reverse the judgment below.

Respectfully submitted,

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